TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 380. 41.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VA., APPELLANT,

vs.

H. C. WADLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED DECEMBER 28, 1906.

(16,457.)

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SUPREME COURT OF THE UNITED STATES.

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I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VA, APPELLANT,

vs.

H. G. WADLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

INDEX.

JUDD & DETWEILER, PRINTERS. WASHINGTON, D. C., DECEMBER 28, 1896.

1

Transcript of Record.

THE UNITED STATES OF AMERICA, *Western District of Virginia,* } *To wit:*

At a circuit court of the United States for the western district of Virginia, continued and held at Abingdon, Virginia, on Tuesday, the 18th day of August, A. D. 1896—present, the Honorable Charles H. Simonton, circuit judge—among other, were the following proceedings, to wit:

2

I. R. HARKRADER, Sheriff and Jailer of Wythe County, Va., *vs.* H. G. WADLEY. } *Ex Parte:* H. G. Wadley. Petition for Writ of *Habeas Corpus.*

3

Petition for Writ of Habeas Corpus by H. G. Wadley.

Paper No. 1. Filed August 18, 1896.

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Va., Fourth Circuit.

In the Matter of the Application of H. G. WADLEY for a Writ of *Habeas Corpus.*

To the honorable circuit court of the United States in and for the western district of Virginia, at Abingdon, Va., fourth circuit:

Your petitioner, H. G. Wadley, respectively represents and shows to this honorable court that he is a citizen of the United States of America and a citizen of the State of North Carolina and a resident of the city of Wilmington, in that State; that he is unjustly and unlawfully detained and imprisoned in the county jail of Wythe county, Va., at Wytheville, Va., in the custody of I. R. Harkrader, sheriff of said county, and as such the warden and keeper of said jail, by virtue of a warrant or order of commitment made by the county court of Wythe county, Va., at Wytheville, Va., on Monday, the 10th day of August, 1896, a copy of which order or warrant of commitment is hereto annexed, marked Exhibit "A."

Your petitioner would now show that on a petition filed by him before the Honorable Charles H. Simonton, United States circuit court judge for said fourth circuit, embracing said western district of Virginia, on the 5th of August, 1896, the said honorable judge, Simonton, entered an order on said petition, allowing it to be filed in the equity cause of H. G. Wadley *v.* Blount & Boynton *et als.* pending in said court, and on said petition, duly verified and sustained by affidavits, the said honorable judge, Simonton, on said 5th day of August, 1896, in accordance to the prayer of said petition, granted an injunction against Robert Sayers, the Commonwealth's attorney of Wythe county, Va.; J. A. Walker and C. B. Thomas,

special prosecutors, and the creditors embraced in said petition, together with their counsel, from all further proceedings in said county court of Wythe upon an indictment obtained against the said H. G. Wadley in said county court on the 16th day of May, 1894, and especially from exacting or requiring any bail or any commitment to imprisonment of said H. G. Wadley on said indictment in said county court.

A certified copy of the said petition which was presented to Judge Simonton on the 5th of August, 1896, is herewith filed, marked Exhibit "B," and a certified copy of the said order of Judge Simonton of the 5th of August, 1896, on said petition is likewise herewith filed, marked Exhibit "C."

Your petitioner, H. G. Wadley, would further show that heretofore, to wit, on the 31st of January, 1895, on an injunction theretofore awarded by him to your petitioner in his case of H. G. Wadley *v.* Blount & Boynton *et als.*, in this court, by the Honorable Nathan Goff, he, by a decree of that date, fully sustained the contention of your petitioner by refusing to dissolve said injunction and continuing it in full force, and by said decree enjoined and prohibited all further prosecution of said indictment in the county court of Wythe county, Va., as shown by copy of the said decree and the opinion of the Honorable Nathan Goff, herewith filed, marked Exhibit "D."

Your petitioner had hoped that after this final decree in the United States circuit court by the Honorable Nathan Goff on said injunction, prohibiting all further prosecution of said indictment, that the order of that honorable court would have been obeyed; but that was a vain conjecture, as the said Robert Sayers, Commonwealth's attorney of Wythe county, Va., and said special prosecutors, J. A. Walker and C. B. Thomas, persisted and continued from term to term or from time to time in calling up said indictment in said county court and asking for a continuance of the said indictment and for the commitment of the said H. G. Wadley to the county jail of Wythe county, and he was bailed with sureties for his appearance before the said county court to appear on
4 Monday, the 10th of August, 1896, being the first day of the August term of the said county court. Your petitioner would now show that notwithstanding the fact that the honorable judge, Simonton, as aforesaid, did on the 5th of August, 1896, enter said order especially forbidding any further order in said case in said court except a mere order of continuance, and although copies of the said order were duly executed on said Commonwealth attorney, Robert Sayers, and on said special prosecutors, J. A. Walker and C. B. Thomas, and all of the creditors named in said petition and upon their counsel of record by the marshal for the western district of Virginia; which order was duly executed on Saturday, the 8th of August, 1896—

Your petitioner, H. G. Wadley, would now show that in flagrant and contemptuous violation of both of the orders named, that of the Honorable Nathan Goff of the 31st of January, 1895, prohibiting all further prosecution of said indictment, and in violation likewise of the said order of the Honorable Charles H. Simonton of

the 5th of August, 1896, upon the calling of the said indictment this day in said county court of Wythe county, Va., the said Commonwealth's attorney and one of the special prosecutors asked for a continuance and stated that they had nothing to do with the question of bail or with the question of the commitment of petitioner, but that that was the duty of the court, and thus indirectly accomplished what the order of Judge Simonton in express words prohibited, for the said Commonwealth's attorney and special prosecutors, instead of asking a compliance by the said county court with the order of Judge Simonton, indirectly asked the court to commit him by saying it was the duty of the court to do so, and thereupon W. E. Fulton, the judge of the county court of Wythe county, Va., in violation of said orders of the United States court, did order the said petitioner, H. G. Wadley, to be committed to the sheriff of Wythe county, to keep and hold him over to answer said indictment, which is now enjoined by the said United States court, and your petitioner is now in the custody of the sheriff of Wythe county, at Wytheville, who is *ex officio* the warden and jailor of said county, and your petitioner is thus deprived of his personal liberty by the said court on its own motion committing petitioner to the custody of the jailor of Wythe county, Va., procured as aforesaid.

Petitioner avers that the said indictment upon which petitioner was committed was illegally and improperly obtained, in violation of petitioner's rights as a citizen of the United States, by the counsel for the said creditors having themselves summoned before the grand jury of the county court of Wythe county, Va., on the 16th of May, 1894, and carrying before the grand jury and reading to them a copy of the deposition of your petitioner, which had been taken of petitioner in an equity suit of Blount & Boynton *et als. vs.* H. G. Wadley *et als.*, and thus indirectly by said record or deposition from the United States court taken in a cause in that court indirectly required petitioner to testify against himself in a criminal case, and upon the mere copy of said deposition of petitioner, illegally taken from the files of the said cause in the United States court and read to said grand jury of Wythe county, petitioner was indicted. A copy of said indictment is fully set forth, with said exhibit, along with the petition filed on the 5th of August, 1896, and is here referred to as a part of this petition.

Petitioner avers that his term of imprisonment, now complained of, began on the 10th day of August, 1896, at 12 o'clock m., and that such imprisonment still continues, and that he is now in the custody of the said sheriff as such jailer at Wytheville, Va.

Your petitioner will now show that his detention and imprisonment as aforesaid is illegal in this, to wit:

First. That this court, by two decrees, that of Judge Goff of 31st of January, 1895, as also by the second order of Judge Simonton of 5th of August, 1896, declares and adjudicates the prior jurisdiction of the said United States court, both of the person of your petitioner and also of the subject-matter of the controversy and of the issues involved in said indictment, and that said prior jurisdic-

tion of the said United States court renders such detention and imprisonment of prisoner by said county court illegal.

5 Second. That, as stated by the Honorable Nathan Goff in his petition filed with his order of the 31st of January, 1895, in the injunction case, the indictment against petitioner in said county court of Wythe county, Va., was obtained against him illegally and in violation of his constitutional rights as a citizen of the United States, by the misuse and abuse of the records of the United States court, in the withdrawal therefrom of a copy of the deposition of petitioner taken in said court in said equity cause and read and used before the said grand jury of said county court of Wythe as the foundation of said indictment.

Wherefore, to be relieved from said unlawful detention and imprisonment, your petitioner, H. G. Wadley, prays that a writ of *habeas corpus*, to be directed to I. R. Harkrader, sheriff of Wythe county, Va., at Wytheville, Va., and keeper of the said jail of the said county, and in whose custody petitioner now is, may issue in his behalf, so that your petitioner, H. G. Wadley, may be forthwith brought before this court, to do, submit to, and receive what the law may direct, and upon the hearing thereof that your honor will discharge petitioner from all further custody or imprisonment, and that he go hence without bail.

H. G. WADLEY, *Petitioner.*

JOSEPH C. WYSOR,
D. F. BAILEY,
BLAIR & BLAIR,
Counsel for Petitioner.

STATE OF VIRGINIA, } *To wit:*
County of Wythe, }

H. G. Wadley, petitioner in the foregoing petition, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and the said statements made are true as he verily believes.

H. G. WADLEY.

Sworn to by the said H. G. Wadley before me and by me subscribed on this the 10th day of August, 1896.

[SEAL.] ROBERT W. BLAIR,
Notary Public, Wythe County, Va.

6 *Writ of Habeas Corpus on Petition of H. G. Wadley. Filed Aug.* 18, 1896.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fourth Circuit, Western District of Virginia, at Abingdon, Va.

To I. R. Harkrader, sheriff of Wythe county, Va., and as such jailor of such county:

We command you that the body of H. G. Wadley, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before me, Charles H. Simonton, judge of our circuit court of the United States within and for the said district aforesaid, at Greenville, South Carolina, on the 14th day of August, 1896, to do and receive all and singular those things which the said judge of our said circuit court shall then and there consider of him in this behalf; and have then there this writ.

Witness the Honorable Charles H. Simonton, judge of the fourth circuit of the United States court, this the 11th day of August, 1896, and in the one hundred and twentieth year of the Independence of the United States of America.

CHARLES H. SIMONTON,
Circuit Judge.

Marshal's Return.

WYTHEVILLE, *August 13th*, 1896.

Executed the within by delivering a true copy thereof to I. R. Harkrader, sheriff of Wythe county, Virginia, at Wytheville, Va.

GEO. W. LEVI, *U. S. M.*,
P'r I. H. BUFORD, *D. M.*

7 *Writ of Habeas Corpus and Return of Sheriff. Filed August* 18, 1896.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fourth Circuit, Western District of Virginia, at Abingdon, Va.

To I. R. Harkrader, sheriff of Wythe county, Va., and as such jailer of such county:

We command you that the body of H. G. Wadley, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before me, Chas. H. Simonton, judge of our circuit court of the United States within and for the said district aforesaid, at Greenville, South Carolina, on the 14th day of August, 1896, to do and receive all and singular those things which the said judge of our said circuit court shall then and there consider of him in his behalf; and have then there this writ.

Witness the Honorable Charles H. Simonton, judge of the fourth circuit of the United States court, this the 11th day of August, 1896, and in the one hundred and twentieth year of the Independence of the United States of America.

CHAS. H. SIMONTON,
Circuit Judge.

To the honorable judge of the United States circuit court for the fourth circuit of the United States:

In the matter of the petition of H. G. Wadley and the writ of *habeas corpus ad subjiciendum* which issued from the clerk's office of the circuit court of the United States for the western district of Virginia on the 11th day of August, 1896, and returnable on the 14th day of August, 1896. in the town of Wytheville, Wythe county, Virginia, this respondent, for answer to the said writ, says that he here produces the body of the said H. G. Wadley, the person named in the said petition for the said writ, in obedience to the command and direction thereof, and for further return and answer to said writ here avers that he detained in his custody the body of said H. G. Wadley under and by virtue of an order of the county court of Wythe county, State of Virginia, entered in the case of The Commonwealth of Virginia *vs.* said H. G. Wadley on the 10th day of August, 1896, upon an indictment for a felony pending in said court against said Wadley. So much of said order as relates to the custody of said Wadley is here inserted in the words and figures following, to wit:

"And the court, of its own motion, required the prisoner to enter into bond, with security, in the penalty of $10,000, and until such bond is given he is committed to the custody of the jailer of this county."

And now respondent, having fully answered, prays that said writ may be discharged, and that he may be awarded his costs about his return to the writ aforesaid in this behalf expended; and, in duty bound, he will ever pray, &c.

I. R. HARKRADER,
Sheriff of Wythe County, Va., and as Such Jailer Thereof.

8 EXHIBIT "A."

Order of Continuance and Commitment.

(Paper No. 2.) Filed Aug. 18th, 1896.

VIRGINIA:

In Wythe County Court, August 10, 1896.

THE COMMONWEALTH
v.
H. G. WADLEY. } Felony.

This day came The Commonwealth, by her attorney, and James A. Walker and C. B. Thomas, assistant prosecutors, as well as the

accused, in his own proper person, in discharge of his recognizance; whereupon the attorney for the Commonwealth moved the court to continue this cause on the ground that there are documents, books, and papers in the possession of I. C. Fowler, clerk of the circuit court of the United States for the western district of Virginia, at Abingdon, and that there are other documents, papers, and books in the possession of H. B. Maupin, receiver of the said circuit court of the United States, in the chancery cause of Paul Hutchinson, administrator, against the Wytheville Insurance and Banking Company, pending therein, which said papers, books, and documents are material evidence of the Commonwealth in the prosecution of the said indictment against the said H. G. Wadley, and that the Commonwealth cannot safely go to trial without the said papers, books, and documents; that the said J. L. Gleaves, then attorney for the Commonwealth of Virginia for Wythe county aforesaid, at a former term of the circuit court of the United States, applied to the said circuit court for an order directing the said clerk and the receiver to obey any *subpœna duces tecum* issued from the clerk's office of this court, requiring said clerk and said receiver to produce said papers, books, and documents before this court on the trial of this prosecution, and that since said order was entered in the said circuit court of the United States the said J. L. Gleaves, attorney for the Commonwealth aforesaid, procured *subpœna duces tecum* to be regularly issued from the clerk's office of this court for said I. C. Fowler, clerk as aforesaid, residing at Abingdon, Virginia, and H. B. Maupin, receiver as aforesaid, residing in Wythe county, Virginia, requiring them to produce said papers, books, and documents in their possession as aforesaid; which said *subpœnas duces tecum* were duly executed on the said I. C. Fowler, clerk, and the said H. B. Maupin, receiver, but that they refused and declined to obey the same or to produce said papers, books, and documents, because since said order was entered by the United States court and since said *subpœnas duces tecum* were issued and served the accused, H. G. Wadley, had prepared and sworn to a bill asking for an injunction restraining the said I. C. Fowler, clerk, and the said H. B. Maupin, receiver, from obeying any such *subpœna duces tecum;* which bill was presented by counsel for the said H. G. Wadley to the Hon. Nathan Goff, one of the circuit judges of the United States for the fourth circuit, and on the *ex parte* motion of the said Wadley the said judge awarded an injunction restraining the said J. L. Gleaves, attorney for the Commonwealth of Wythe county, Virginia, either by himself or the agreement of others; I. C. Fowler, clerk of the said United States circuit court; H. B. Maupin, receiver as aforesaid, by themselves or by their agents or defendants, from all further proceedings or participation by them or either of them in a prosecution now pending in the county court of Wythe county, in the name of The Commonwealth *v.* H. G. Wadley, for the embezzlement of the assets of the Wytheville Insurance and Banking Company, restraining and enjoining them and all other defendants named in said bill, including their attorneys, clerks, agents, either directly or in-

directly, through their own agency or the agency of others,
9 from in any manner using against said H. G. Wadley in any other court, State or Federal, in any other case, civil or criminal, the deposition of the said Wadley taken in another case of Paul Hutchinson, adm'r, *v.* The Wytheville Insurance and Banking Company, pending — the circuit court of the United States for the western district of Virginia, or any copy thereof or extract therefrom.

And the prayer of said bill is in the following words:

Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed for, and that they may answer to the matters hereinbefore stated and charged, the prayer of your orator is—

That this bill of injunction and for relief be treated as incidental to said suit now pending in your honor's said court at Abingdon; that your honor may grant a writ of injunction, issuing out of and under the seal of this honorable court, restraining and enjoining, under the penalty for a violation hereof, all of the defendants to this bill, including their attorneys, clerks, and agents, either directly or indirectly, through their own agency or through the agency of others, from in any manner using against orator in any other court, State or Federal, in any other case, civil or criminal, the said deposition of your orator aforesaid taken in said suit in equity, or any copy thereof, or the report of Master Commissioner Gray, taken and filed therein, or any copy thereof, or any of the books, papers, records, or correspondence, or any copies thereof or extracts therefrom, of the Wytheville Insurance and Banking Com., in the possession or that came under the control of said Gray, commissioner, or of H. J. Heuser, late receiver, or of H. B. Maupin, present receiver, or of I. C. Fowler, clerk, in said equity suit that was brought in this court by said creditors; that your honor will likewise enjoin each and all of said defendants, creditors, who are now parties by the decrees of this court in said suit in equity now pending in this court, whether they are parties to the original bill or intervenors by petition or are plaintiffs in the amended, supplemental, and cross bill, or whose claims have been allowed by or presented to the master commissioner, Gray, for allowance, together with all their attorneys, clerks, or agents, either through their own agency or acts or through the agency or acts of others, and also the said J. L. Gleaves, the Commonwealth's attorney of Wythe county, Virginia, either by himself or by the agency of others, and said commissioner, Gray; receivers, Heuser and Maupin, and said clerk, Fowler, by themselves or their agents or deputies, from all further prosecution of or participation by them or by either of them in the criminal proceedure now pending in the county court of Wythe county, Virginia, in the name of The Commonwealth of Virginia *vs.* H. G. Wadley, upon an indictment for embezzlement of the assets of the Wytheville Insurance & Banking Co., the said creditors having already submitted themselves and their claims affected by or involved in said criminal proceedure, by their bill in equity, to

the prior jurisdiction of this court; that your honor, upon a final hearing of this cause, will punish the parties involved for their unjust and unlawful misuse of the records of this court in said equity suit, for the promotion and prosecution by said creditors of said criminal proceedure against your orator, now pending in the said county court of Wythe county, Virginia, put on foot by said creditors and their attorneys.

Copy.

Attest: I. C. FOWLER, *Clerk.*

10 The restraining order is in the following words:

PAUL HUTCHINSON, Adm'r of Chas. Hutchinson, Dec'd, *et al.*, *vs.* THE WYTHEVILLE INSURANCE & BANKING COMPANY, } On Original Bill in Equity.

and

BLOUNT & BOYNTON *et als.* *vs.* H. G. WADLEY *et als.* } On Amended, Supplemental, and Cross Bill in said Suit.

This day came H. G. Wadley, one of the defendants in the above proceedings in equity now pending in the above-named court, and he presented his bill for an injunction in his name against said Blount and Boynton *et als.*, and this said bill being duly sworn to by H. G. Wadley and fully supported by the affidavits of J. H. Gibboney, H. J. Heuser, and J. B. Barrett, Jr., the cause came on this day to be heard upon said bill for injunction, and upon all the exhibits filed thereto, and upon a transcript of the record of said original bill and said amended, supplemental, and cross bill above named, and, upon reading said bill and affidavits and the said exhibits and transcripts, the court is of opinion that the equity jurisdiction of the United States court above named first attached to both the persons and the subject-matter involved in said suits in equity, and that it is improper that the records of the pleadings, proofs, books, and papers filed in and parts of said equity suits now in litigation and pending unadjudicated in this court between said parties, or copies thereof, should be withdrawn therefrom and used by any one in any criminal or other proceeding, in any other court, against the said party to any of said suits, in regard to any matters in issue in said suits in equity, until the same have been fully adjudicated by this court; and it appearing to this court from said bill for injunction that such has been done and is now threatened by parties to said suits in equity for use in a criminal proceeding just begun by them in the county court of Wythe county, Virginia, against said H. G. Wadley, for matters involved in and growing out of said suits in equity which were first instituted and are still pending in litigation and undetermined in this court, it is ordered that an injunction be awarded to said H. G. Wadley according to the prayer

of his bill; and it appearing to the court that the defendants in said bill are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

But before this injunction shall take effect the said H. G. Wadley will execute a bond before the clerk of the court in the penalty of $10,000.00, conditioned according to law, with N. L. Wadley as his surety, who is approved as such surety, proof of her solvency being now made.

H. GOFF,
Circuit Judge.

June 8th, 1894.

To I. C. Fowler, clerk United States circuit court, Abingdon, Va.

11 And thereupon, on motion of the attorney for the Commonwealth, the case is continued until the next term.

And the court, of its own motion, required the prisoner to enter into a bond, with security, in the penalty of $10,000.00, and until such bond is given he is committed to the custody of the jailer of this county.

Enter.

WM. E. FULTON.

A copy.
Teste: WM. B. FOSTER, *Clerk.*

12 *Denial & Reply of Wadley to Sheriff's Return.*

Filed Aug. 18, 1896.

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Fourth Circuit.

H. G. WADLEY
v.
I. R. HARKRADER, Sheriff of Wythe County, Va. } Answer and Denial of Return.

The petitioner, H. G. Wadley, comes and says that for aught contained in the said return of I. R. Harkrader, sheriff of Wythe county, Virginia, for his petition for *habeas corpus* that petitioner is entitled to his discharge, because he denies, as contained in said return, said county court of Wythe county, Virginia, had any jurisdiction of said petitioner or the subject-matter of said indictment at the time it was found or now has such jurisdiction. Petitioner denies the validity of the order of commitment of said court of petitioner to said sheroff of 10th August, 1896, relied on in said return, and says that commitment is void, because said court had no jurisdiction to enter it, and also because the indictment upon which the petitioner was so committed was obtained in violation of the Constitution of the United States by the illegal and unconstitutional use of petitioner's deposition, withdrawn from the files of this court and car-

ried before and read to the said grand jury which found the said indictment, and hence said custody is unlawful, and petitioner is deprived illegally of his personal liberty.

Demurrer.

H. G. WADLEY
v.
I. R. HARKRADER, Sheriff of Wythe County, Va.

And now comes H. G. Wadley in his own proper person and by his counsel, Blair & Blair, and, having heard the return of said sheriff read in answer to the writ of *habeas corpus* awarded in this cause, he says that the said return and matters contained therein and set forth are not sufficient in law, and that the said return shows no legal ground for petitioner's detention by said sheriff, and that it is not sufficient answer to the matters of law and fact contained in said petition and exhibits; and this he is ready to verify. Wherefore, for want of any sufficient return in this behalf, said H. G. Wadley, the petitioner, prays judgment that the said return be held insufficient; that an order be entered discharging petitioner from the custody of the said sheriff.

H. G. WADLEY, *Petitioner.*

We, F. S. Blair and J. C. Blair, attorneys, practicing in the United States court, fourth circuit, do hereby certify that in our opinion the foregoing demurrer to said return of I. R. Harkrader, sheriff of Wythe county, Va., is proper, and said demurrer should be sustained.

F. S. BLAIR &
J. C. BLAIR.

UNITED STATES OF AMERICA,
Western District of Virginia, Wythe County.

I, Robert W. Blair, a notary public in and for said Wythe county, Virginia, do hereby certify that this day personally appeared before me, in my said county, H. G. Wadley, who made oath that the facts contained in the foregoing demurrer, and also in his answer and denial of the sheriff's return, are true, to the best of his knowledge, information, and belief.

Given under my hand and seal this 12th day of August, 1896.

H. G. WADLEY, *Petitioner.*

Sworn to before me, at Wytheville, Va., by H. G. Wadley on this 12th day of Aug., 1896.

ROB'T W. BLAIR,
Notary Public.

13 *Final Order of Discharge, with Return.*

Paper No. 8. Filed August 18, 1896.

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Fourth Circuit.

In the Matter of the Application of H. G. WADLEY for a Writ of *Habeas Corpus.*

On this the 14th day of August, 1896, came H. G. Wadley, the petitioner, by his counsel, Blair & Blair, and this cause coming on to be heard upon the petition for a writ of *habeas corpus* and for order of discharge, with the exhibits filed with the said petition, and said petition being duly verified by the affidavit of the petitioner, and upon the writ of *habeas corpus* issued on said petition on the 11th of August, 1896, and duly executed upon I. R. Harkrader, sheriff of Wythe county, and as such the jailer and warden of said county, in whose custody the petitioner is detained, and upon the return of said sheriff to said writ of *habeas corpus*, with the commitment filed therewith as the authority under which he acts, upon the demurrer of petitioner to said return and joinder in said demurrer, and upon the answer and denial of the said petitioner to said return, and upon the record in said case of H. G. Wadley *vs.* Blount and Boynton *et al.*, and upon the production of the body of said H. G. Wadley before this court by the said sheriff, the said sheriff appearing in person, and also by counsel, att'y gen. of Va., and after argument of counsel, and the court being fully advised in the premises, the court finds that the said petitioner, H. G. Wadley, is unlawfully restrained of his liberty by the county court of Wythe county, Virginia, by virtue of an order of the judge thereof, committing him to custody in default of bail, entered on 10 Aug., 1896, on an indictment of the Commonwealth of Virginia *versus* H. G. Wadley on a complaint of felony set up in the petition, notwithstanding the injunction and writ of this court, it is therefore considered and ordered by this court that the said H. G. Wadley be discharged from the custody of the said I. R. Harkrader, sheriff of Wythe county, Virginia, and from the custody of said court, as said court cannot prosecute said indictment pending said injunction, and that the said H. G. Wadley hold himself subject to the further order of this court.

And it is further ordered that the United States marshal for the western district of Virginia serve a copy of this order upon I. R. Harkrader, sheriff of Wythe county, Virginia, and as such the warden and jailer of said county, and also a copy thereof upon W. E. Fulton, judge of said court, and Robert Sayers, Jr., the Commonwealth's attorney for Wythe county, Virginia.

CHARLES H. SIMONTON,
Circuit Judge.

15th August, 1896.

To I. C. Fowler, clerk of this court at Abingdon, Va.

The att'y general of Virginia in his proper person states that *for* this order the Commonwealth of Virginia desires to appeal.

CHARLES H. SIMONTON.

Return.

Service of within accepted by copy handed us Aug. 21, '96.

ROB'T SAYERS, JR.,
Commonwealth's Attorney.
WM. E. FULTON,
Judge of Co. Court, Wythe Co.
I. R. HARKRADER, *S. W. C.*

The foregoing is a true copy of the original this day entered of record in the order book of the court. Witness my hand and the seal of the said circuit court of the United States for the western district of Virginia, at Abingdon, this 19th day of August, 1896.

I. C. FOWLER, *Clerk.*

14 *Bill and Petition for Injunction.*

Filed August 6th, 1896.

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

H. G. WADLEY
vs.
BLOUNT & BOYNTON *et al.* } In Equity.

To the honorable judge of said court:

The petition of H. G. Wadley, a resident and citizen of the city of Wilmington and of the State of North Carolina, would respectfully show to the court that, in vacation of this court on the 8th day of June, 1894, he presented to the Honorable Nathan Goff, the judge of the circuit court of appeals of the United States for the fourth circuit, sitting as a circuit judge, his bill in the above suit in equity for an injunction and for other purposes against the defendants in the above-named cause, whose names will be hereafter given in detail. The bill was duly verified by affidavit and was perfected according to law. Among other things, the bill charged that the defendants in the above cause, by an original bill filed in this court on the 5th day of October, 1893, under the style of Paul Hutchinson against the Wytheville Insurance & Banking Company, and by petitions of Blount & Boynton and others, creditors of said company, filed in said cause on 18th and 19th days of October, 1893, and by an amended and supplemental bill filed on the 25th of May, 1894, by said creditors, under style of Blount and Boynton *et al. vs.* said company and H. G. Wadley and others; that the said creditors by said proceedings alleged the insolvency of said company; that

they held debts and valid claims against the said company amounting to many thousand dollars in the aggregate, charging mismanagement of the business affairs of the company by H. G. Wadley, asking and obtaining the appointment of a receiver of the assets of the company, and also asking and obtaining the appointment of a master commissioner, with instructions by the court to investigate the conduct of the affairs of the company, report its assets and the manner in which they had been invested or disposed of, with other inquiries contained in the order of reference; that said proceedings charged the misappropriations of said assets by H. G. Wadley, and asking a personal decree against him; that the master, Preston L. Gray, after due notice to the parties, executed the order of the court, and in execution thereof and for the purposes of taking the account he took charge of all the books, papers, correspondence, and records of the said company bearing upon its official affairs, and, among other things, the master called himself and examined as a witness in the said cause your petitioner, H. G. Wadley, relative to his management of the business affairs of said company, of which he had been president, and that his deposition was so taken on the 8th day of February, 1894, to be read as evidence in said cause and before the said commissioner, who introduced him, as before stated, as a witness, and that petitioner was examined as a regular witness introduced in said cause; that he was cross-examined by the counsel for the creditors; that the object of his examination by said commissioner, and especially by the creditors, was to fix an individual liability on your petitioner, H. G. Wadley, by showing the unlawful disposition by him of the assets of the said company. The master filed his report on 27th April, 1894, in which he reported that your petitioner was indebted to said company in the sum of $196,342.24; that thus your honorable court had prior jurisdiction of your petitioner and of all said creditors, of the assets of said company, its books, papers, accounts, and records, in fact of the entire subject-matter of controversy between the said creditors and your petitioner growing out of the business affairs of said company, of which petitioner had been president, and that a personal decree was asked by said creditors against your petitioner for said sum of $196,342.24. The bill further showed that after these proceedings had thus been instituted, and while they were still pending in your
15 honor's court unadjudicated, and while your honorable court had prior and exclusive jurisdiction of all said parties and of said subject-matter, to the exclusion of all other cou-ts and tribunals, that on the 16th day of May, 1894, the said creditors, by their counsel that were prosecuting the said equity proceedings in your honorable court, unlawfully withdrew from the files of said causes and from your honor's court a copy of the deposition of your petitioner, H. G. Wadley, and having some of their counsel summoned as witnesses before the grand jury of the county court of Wythe county, Virginia, upon said deposition or fragmentary part thereof, caused your petitioner to be indicted for an embezzlement and misappropriation of the funds of said company, and in said indictment, in the form of criminal charges, set up the same matters

and issues in said criminal proceedings as are set up in equity proceedings theretofore instituted and then pending in your honor's court, and that thus these identical creditors, acting by the same counsel, employed for the purpose, were pursuin- your petitioner for identically the same subject-matter in the said equity suit pending in this court and in the criminal proceedings in the county court of Wythe county, Virginia. Your petitioner's bill alleged explicitly and as a matter of grievance to him that under this indictment thus illegally and unconstitutionally obtained he had been taken into custody by the said county court of Wythe county, Va., and was held under a bail bond to appear and answer the said indictment. The bill further charged that after the said master had made up his report and when the nature of the same and its findings had been communicated to the creditors that they and their counsel, after consultation together, decided to and did offer a proposition for settlement of the debts mentioned in the report of said master, and that this proposition for settlement was made directly to your petitioner, H. G. Wadley, by which they agreed to accept fifty cents on the dollar in full satisfaction of their said claims, and that the said offer being made said Wadley by a committee of the creditors for the purpose, it was promptly rejected by him, and that he was allowed only the period of ten days within which to accept or reject the said proposition of settlement or condonation of embezzlement viewed from the standpoint of the creditors. The said proposition, showing the terms thereof, the names of the creditors who participated therein, and the counsel who represented them, was filed as an exhibit with the bill; and it was charged and proven that before said offer of settlement was made that he was threatened with a criminal prosecution if he did not settle with them the debts they claimed to be due them by said company. It was further alleged in the bill that in the event he should pay said 50 cents on the dollar that the matter would be in full, but if he rejected the proposition he would be prosecuted criminally in the courts of the United States. The bill further allegee that the creditors had procured a copy of the report of the master and had used it as evidence before the grand jury, as wel- as a copy of the deposition of petitioner, and upon that evidence the said indictment had been procured. Petitioner insisted that his rights as a citizen of the United States had been violated by said grand-jury proceeding in this, that it is provided by the 5th amendment to the Constitution of the United States that no person shall be compelled in any criminal case to be a witness against himself, and that in pursuance of this provision of the Constitution the Congress of the United States enacted sec. 860 of the Revised Statutes, which prohibits the use of pleadings and evidence taken in judicial proceedings as testimony in criminal prosecutions. The conduct of creditors in unlawfully reading to said grand jury petitioner's deposition taken in the Federal cause was compelling him indirectly to testify against himself in said criminal cause as a basis of said indictment. The bill charged that the use of copies of the master's report and of petitioner's deposition in the criminal pro-

ceedings in Wythe county court, in the State of Virginia, was unconstitutional and illegal, as affecting the rights of petitioner, and also a flagrant contempt and abuse of the records of your honorable court. The bill asked for an injunction to restrain all use of said books, papers, and records by the said State court, and also to restrain the further prosecution of said indictment in the county court of said Wythe county, Virginia, and for general relief.

The exhibits were all filed with the bill, and it was answered by said creditors and by the Commonwealth's attorney of said
16 county, J. L. Gleaves.

Testimony was taken for both plaintiff and defendant and issues joined thereon. The cause came on to be heard before the Honorable Nathan Goff, circuit judge, at Abingdon, on the 8th day of June, 1894, upon a motion to dissolve said injunction and dismiss the said bill, and was heard upon the original bill for an injunction filed by your petitioner against the said Blount and Boynton *et al.*, with answer and general replication thereto, depositions of witnesses and argument of counsel, and the honorable judge took time to consider of his decision until January 31st, 1895, when, in an elaborate opinion, with his reasons therefor, he fully sustained the contention of your petitioner by refusing to dissolve the injunction, but continuing it in force in the manner hereinafter stated.

The Honorable Nathan Goff in his said opinion in this case, from all the testimony before him, was of the opinion and so adjudged that it was true that after the said creditors of the Wytheville Ins. and Bkg. Co. had intervened and had been made parties complainant in said original cause of Paul Hutchinson, &c., against said company, and after they had proven their claims before the master and he had formulated his report, that the said creditors, in a meeting called and held for the purpose of determining a proper course for them to pursue in the light of the case as shown by said report and petitioner's deposition, did submit to petitioner an offer to adjust the debt reported by the master, and as to which the creditors claimed petitioner was individually liable at a compromise at the rate of fifty cents on the dollar; but that the said creditors at the same time had an understanding among themselves that if petitioner declined such proposition that they would procure his indictment in the county court of Wythe county, Virginia, and prosecute him for the embezzlement of the funds of said company, and that the money required to carry on such criminal proceedure was arranged for at the same meeting that the offer of compromise was agreed to. The honorable judge also decided and was of the opinion that when such offer of settlement was declined by petitioner that the said creditors proceeded to procure his indictment by using for that purpose a copy of his deposition so taken before the master of this court, and that they evidently procured the summoning of their own counsel as witnesses before the grand jury and having them assist in the preparation of the bill of indictment and in the prosecution of your petitioner under it. The honorable judge further decided that the criminal proceedure when first suggested was intended to aid the said creditors in adjusting their debts with your

petitioner, and of this he says he has no doubt, and that the fact that the effort failed was wholly immaterial; and the honorable judge proceeds to say that the evidence discloses conduct on the part of said creditors that cannot be justified and is far from being conducive to the fair administration of justice; that it is in fact most reprehensible, dangerously near the border line that divides impropriety from criminality; and the honorable judge expresses the hope that never again in this jurisdiction will an effort be made to duplicate it. The honorable judge further decided that under the circumstances of this case it is proper for a court of the United States to restrain parties from prosecuting a case in the State court, and that the circumstances proven fully warranted it, and that under section 720 of the Revised Statutes of the United States, construed in connection with sec. 716, the courts of the United States have the power to issue all writs necessary to the exercise of their respective jurisdiction and agreeable to the usages and principles of law. He adjudges and decides that if a United States court has first obtained jurisdiction of a case, it can then always take such action as may be required to maintain its authority and enforce its decree, and under such circumstances sec. 720 of the Revised Statutes is not applicable, and the learned judge on page 15 of his opinion cites decisions of the Federal court in support thereof. He further adjudges that where the United States court has first obtained jurisdiction of the parties and of the subject-matter, and a criminal prosecution has been instituted while such civil suit was pending, involving the same subject-matter, and the parties procuring the indictment are the same as those in the civil suit, that such Federal court whose jurisdiction was first sought and before
17 which said civil proceedings were so pending and undetermined can restrain the parties from prosecuting the indictment until the civil cause can be heard and disposed of. He also cites many authorities in support of this position.

After full consideration of the entire case the Honorable Nathan Goff, as such circuit judge, for the reason mentioned, shall sustain the plaintiff's bill and continue in force the restraining order heretofore granted. Other questions interesting in character and of great general importance are raised by the plaintiff and are discussed by counsel, but I do not find that their consideration *are* essential to the disposition of this case, and therefore I shall not now allude to them.

I will pass a decree declaring that as the equity jurisdiction of this court first attached to both the parties and the subject-matter involved in this litigation that it will be improper to use the pleadings, proofs, and papers filed herein or any of them, or copies thereof, in any proceeding, civil or criminal, in any other court, against any party to this suit, while it is pending in and unadjudicated by this court.

And he then orders an injunction to issue restraining such use, and in terms enjoins all parties, including the attorney for the State, in Wythe county, Virginia, " from all further prosecution of the indictment now pending in the county court of said county, in

the name of the Commonwealth of Virginia *vs.* H. G. Wadley, in which he is charged with the embezzlement of the funds of the Wytheville Insurance & Banking Company, until the final hearing shall have been had and disposition made of the said cause of Paul Hutchinson, adm'r, *vs.* Wytheville Ins. & B'k'g Co. *et al.*, and the petitions and supplemental bill therein, and until the further order of this court."

A copy of the said opinion of the honorable judge is herewith filed, marked Exhibit "A," as a part of this petition.

Your petitioner would further show that on the 31st January, 1895, in pursuance to said written opinion, a decree was rendered in said cause of H. G. Wadley *vs.* Blount & Boynton *et al.*, in equity, on said bill for an injunction, and was duly entered by I. C. Fowler, clerk of the U. S. circuit court, at Abingdon, on that day.

From said decree it will be seen that this honorable court adjudged, ordered, and decreed that the motion to dissolve petitioner's injunction be, and the same was thereby, overruled, and it was adjudged, ordered, and decreed that said injunction should not be dissolved, but that for the reasons stated in the opinion *and* filed therewith that petitioner's said bill of injunction be sustained, and that the injunction theretofore granted should continue in force, and the said decree enjoined all the parties, their attorneys, clerks, and agents, and the attorney for the Commonwealth of Virginia for Wythe county, either directly or indirectly, from all further prosecution of the said indictment, and the court in its said decree adjudged that the plaintiff's bill was fully sustained, and gave petitioner the right to ask thereafter to make such further presentations of other questions to the court as he might be advised it was proper to do, and, as an evidence of the finality of said decree, it adjudged to your petitioner the costs of the cause, and ordered the clerk to tax the same and issue an execution in favor of petitioner for it, and further ordered that a copy of the decree be served on counsel of record in the cause or by an order of publication. A copy of that final decree is herewith filed, marked Exhibit "B."

Your petitioner would now aver that the said decree has never been appealed from, is unreversed, and is still in full force and effect, and is a final adjudication of the matters set up in said plaintiff's bill, which were fully sustained.

It will be observed from the opinion of this honorable judge, on page 5 of his opinion, that it was alleged in the bill that petitioner had been taken into custody by the county court of Wythe county, Virginia, and was then held under a bail bond to appear and answer the said indictment. In petitioner's bill for injunction he claimed that this said requirement of bail was illegal and in violation of his rights as a citizen of the United States, and in conformity to the prayer of his bill and of his complaint the honorable court, both in its opinion on page 17 and in the decree on page 21, enjoined all the parties and their attorneys and the attorney for the Commonwealth of Wythe county from all further prosecution of the said indictment. Your petitioner is advised that the

18 prosecution of an indictment embraces and comprehends all

steps and proceedings from its commencement to its final termination, including arrest, commitments to jail, bail, and trial, and all of its incidents. He is further advised that bail is but an enlargement of the prison bounds, and that the only difference between committing a prisoner to jail and admitting to bail is that in the first instance he is committed to the custody of the jailer, and in the last instance he is committed to the custody of the sureties in the bail piece or bail bond; and he is further advised that such sureties can produce his body at any time and surrender him to the custody of the jailer, and that in contemplation of law a prisoner on bail by a court is as much in custody as if he were incarcerated within the prison walls.

Petitioner would repeat that the injunction in this cause was awarded by honorable circuit judge on the 20th day of June, 1894, and it was executed on all of the defendants by service on their counsel of record on 21st of July, 1894. Petitioner had hoped that said creditors would obey this order of your honor's court and refrain from all further prosecution of the indictment referred to, and that the said creditors and their counsel and the Commonwealth's attorney of Wythe county would alike refrain from all further participation in or further prosecution of said indictment in obedience to said writ, which was duly executed on all of them; and your petitioner now comes to state his grievance, for redress of which this petition is filed.

As already stated, the said illegal indictment was procured in the county court of Wythe on 16th May, 1894, and on that day the said court admitted petitioner to bail, with V. C. Huff and C. M. Trinkle as his bailsmen, in the penalty of $10,000, conditioned for his appearance at the July term, 1894. As stated, the said injunction was issued on the 20th June, 1894, and executed the next day. At the July term, 1894, of said county court, when the case was called of Commonwealth *versus* petitioner, the Commonwealth's attorney, with C. B. Thomas and James A. Walker, who were counsel for the creditors in the civil suit, produced the order of injunction before the said county court of Wythe and had it spread on the order book of said county court and asked a continuance of the case on account of the said order, which was granted, and required the said court to commit petitioner to jail or give bail, with sureties. Petitioner did give bail in same sum, with same bondsmen, returnable to August term of that court, 1894. The original order drawn up in this case for the clerk to enter was written by one of the counsel for the creditors, who was also counsel in the civil cause. If petitioner had not given such bail, he would have been committed to the common jail of Wythe county. Now, petitioner lives at Wilmington, North Carolina, and each trip to Wytheville *costs* him about fifty dollars. Nevertheless, he was again bailed at the August term, 1894, until September term; at September term until October term; at October term till November term; at November term to the December term; at December term, 1894, to January term, 1895; from January term, 1895, to February term, 1895. As already stated, on 31st January, 1895, the final decree in said cause

was entered, refusing to dissolve said injunction, sustaining fully the bill, and decreeing that the injunction should continue in force and especially enjoining creditors and their counsel and the Commonwealth's attorney of Wythe county from all further prosecution of said indictment.

Petitioner would now show that on the 9th February, 1895, in the county court of Wythe county, one of the counsel for said creditors, to wit, J. A. Walker, and another counsel for said creditors, C. B. Thomas, appeared along with the Commonwealth's attorney in said prosecution and entered themselves of record as special prosecutors in the case. The original order drafted by one of said special prosecutors is herewith handed to the court as a part of this petition, marked Exhibit "C." On that day the Commonwealth's attorney, together with said special prosecutors who were counsel in the civil suit in the United States court, resisted a motion of petitioner for his discharge from the jurisdiction of said county court, and again, in order to avoid commitment to jail, your petitioner gave bail, with the same sureties, in the same bond, conditioned for petitioner's appearance in said county court, at July term,
19 1895; and again, at the July term, 1895, he was bailed to November term, 1895; he was bailed to April ter-, 1896, and at April term, 1896, he was again bailed over protest of petitioner, with the same sureties, in the same penalty, by said county court, upon the motion of Robert Sayers, Jr., Commonwealth's attorney of Wythe county, Va., and the said special prosecutors, J. A. Walker and C. B. Thomas, for his appearance before the county court of Wythe county, Va., on Monday, the 10th day of August, 1896, being the first day of the August term of said county court.

Thus it will be seen that petitioner has been required to make eleven trips to said Wythe county court from his home in North Carolina, at said great expense, which has become oppressive and burdensome to him, as well as in violation of his right as a citizen of the United States, and in violation of the decree of this court, referred to, entered on 31st January, 1895, and in contempt of said decree and the said court. The said Commonwealth's attorney and said creditors, by their said counsel, acting as special prosecutors, were not only served with said process of injunction, but at each of said terms have had the order of injunction copied into the order of continuance of the criminal case in the county court of Wythe, but at each term they and each of them have flagrantly disobeyed it by requiring bail from your petitioner, which was in effect continuing the prosecution of the said cause, and in effect depriving petitioner of his liberty by their disobedient conduct.

Petitioner avers that J. L. Gleaves, Esq., was the Commonwealth's attorney of Wythe county until the 1st of July, 1895, and since that time Robert Sayers, Jr., has been the Commonwealth's attorney, and in conjunction with said special prosecutors has continued said prosecution by calling up said case and demanding either a commitment of petitioner to jail or his admission to bail upon a heavy bond and sureties, which has amounted to a deprivation of the liberty of petitioner, and was a violation of the rights of petitioner as

a citizen of the United States, and a wilful disobedience of the decree of the United States court of 31st January, 1895, of which they and each of them had full knowledge. Petitioner avers that the said creditors, by their counsel, have been prime movers and instigators of said prosecution since said injunction was awarded and since the decree refusing to dissolve it and continuing the injunction in force, and they have co-operated actively with the said Commonwealth's attorney in the prosecution of said indictment, at each of the said terms of the county court of Wythe county, Va., by calling up the said indictment, having it continued, entering orders in the said case, and demanding the commitment of petitioner to jail unless he would give bail, with good sureties, in said sum of ten thousand dollars. Petitioner avers that on the said 10th of August, 1896, to which day he was again bailed to appear before said county court, unless (he) renews his bail he will be committed to the common jail of Wythe county in default of said bail, and that, too, upon the motion of said Commonwealth's attorney and said special prosecutors.

Your petitioner herewith exhibits a copy of the subpœna in chancery and injunction order that was executed upon the said creditors and said counsel and other parties except Robert Sayers, Jr., the present Commonwealth's attorney, it having been executed on his predecessor, J. L. Gleaves, Commonwealth's attorney, and from it the court will see the names of all said creditors who were parties defendant to said injunction cause of H. G. Wadley *vs.* Blount & Boynton *et al.;* and petitioner prays that it may be taken and considered as a part of this petition, marked Exhibit " D."

20 *Subpœna in Chancery.*

UNITED STATES OF AMERICA, *Western District of Virginia, at Abingdon,* } *ss:*

The President of the United States of America to the marshal of the western district of Virginia, Greeting:

You are hereby commanded to summon W. M. Blount and Wm. Boynton, citizens of Georgia; F. A. Sieghart, a citizen of New York; Mrs. Kate Nettles, a citizen of Louisiana; James R. Sergeant and Wm. R. Sergeant, partners under the style of Sergeant Bros., citizens of New York; Samuel Tieger, a citizen of New York; C. G. Fargo, a citizen of S. Dakota; American Biscuit Mfg. Company, a citizen of Illinois; The Desha Bank of Arkansas, a citizen of Arkansas; The Batesville Flouring Mill Mfg. Company, a citizen of Illinois; A. J. King, a citizen of South Carolina; A. M. Jordan and J. M. Jordan, partners under the style of Jordan Bros., citizens of South Carolina; H. S. Shephard, a citizen of South Carolina; J. P. M. Cox, a citizen of Alabama; W. N. Gray, a citizen of South Carolina; J. S. Vaughn, a citizen of Tennessee; T. A. Windle, a citizen of Virginia; Roanoke Mineral Wool Company, a citizen of Virginia; B. G. Chandos, administrator of the State of Wisconsin; J. J. & W. D. Dubose, partners under the style of J. J.

& W. D. Dubose, citizens of South Carolina; P. P. Pratt, a citizen of New York; J. J. Kiester, a citizen of Virginia; The Block Company, a citizen of Virginia; Andy Johnson, a citizen of Kentucky; The Hall & Hayward Company, a citizen of Kentucky; M. C. Pink and J. W. Pink, partners under the style of M. C. Pink & Co., citizens of Maryland; D. H. Stevenson and John D. Alexander, partners under the style of Stevenson, Alexander & Co., citizens of Maryland; W. T. Carter, under the style — W. T. Carter & Co.; Silas Kilbourne and Ansen D. Fessenden, citizens of Michigan and partners under the style of Silas Kilbourne & Co.; Phillip P. Kueborth, Phillip P. Kueborth, Jr., and G. J. Kueborth, partners under the style of Kueborth & Son, citizens of Maryland, who sue for the benefit of Edward Hollander and George Hollander, partners under the style of Chas. Hollander & Son, citizens of Maryland; Cannelton Paper Mill Co., a citizen of Indiana; Charles Wesiseker, for the benefit of Wm. Moherham, a citizen of New York; W. H. Waddill, a citizen of Virginia; Lantern Globe Company, a citizen of O.; J. B. Green, a citizen of Virginia; J. Crane, a citizen of Mississippi; A. B. Rodefer & T. A. Rodefer, partners under the style of Rodefer Bros., citizens of O.; Theodore A. Liebler and A. J. Mass, partners under the style of Liebler & Mass, citizens of New York; Andrew Jamison and R. L. W. A. Jamison, partners under the style of A. Jamison & Son, citizens of Pennsylvania; Matilda Lampheimer, a citizen of Louisiana; S. Baker, for the benefit of Isaac, Moses, & Weyer S. Halle, under style of S. Halle & Sons, citizens of Maryland; W. E. Rice, a citizen of Virginia; John C. Kingston, a citizen of New York; A. B. Walker and T. J. Walker, citizens of South Carolina; College Hill Press Brick Works, a citizen of Missouri; Beattyville Lumber Company, a citizen of Kentucky; Joseph Williams, Jr., a citizen of Pennsylvania; Mauer Newmand and Emil Hart, citizens of Illinois; Hiram A. Miller, a citizen of West Virginia; W. S. Wells, a citizen of Ohio; A. S. Gatewood and J. H. Gatewood, citizens of Virginia; S. Krasnoff, a citizen of South Carolina; Meyer Jonasson, Joseph Jonasson, and
21 J. Henry Rotchild, partners under the style of Meyer, Jonasson & Company, citizens of New York; J. Robertson and Thomas Hall, partners under the style of Robertson & Hall, citizens of Pennsylvania; Chicago Refining Oil Company, a citizen of the State of Illinois; N. Martin, a citizen of Illinois; Norwich Shook & Lumber Co., a citizen of Vermont; Ogdenburg Terminal Company, a citizen of New York; Alden Vinegar Company, a citizen of Mo.; Frances E. Johnson and J. B. Sharp, partners under the style of Johnson & Sharp and citizens of New York; Wong Quong Chong and Ah Chow, partners under the style of Chong Kee & Company, citizens of New York; W. H. Baker and H. P. Colvard, citizens of Georgia; Mrs. J. A. Drake, a citizen of Virginia; J. P. Taylor, a citizen of Virginia; W. H. Patterson, a citizen of Virginia; J. D. Pettinger, a citizen of Virginia; W. H. Gooch, a citizen of Virginia; M. B. Shands, trustee and assignee of S. J. Lankford, a citizen of Virginia; E. E. Smith, trustee and assignee of E. Penner, a citizen of Wisconsin; Adel Pino Bros., for

Western National bank, citizens of New York; N. Kimball, citizen of Michigan; S. D. McMillan, a citizen of Wisconsin; T. L. Richardson, U. O. Howe, and T. M. Lovejoy, citizens of Massachusetts; Ely Dowell Company, a citizen of Missouri; Art Publishing Company, a citizen of Massachusetts; Western Brass Mfg. Company, a citizen of Michigan; A. Martin, a citizen of Louisiana; W. H. Gooch, by W. D. Blanks, a citizen of Virginia; Mrs. J. A. Drake, a citizen of Virginia; J. D. Pettingill, a citizen of Virginia; V. P. Patterson, a citizen of Virginia; U. P. Taylor, a citizen of Virginia; W. D. Ryan and C. K. Malony, partners under the style of Ryan & Malony, citizens of Virginia; Chas. Thompson, a citizen of Tenn.; Thos. R. Spaulding and K. F. Miller, partners under the style of Spaulding, Miller & Co., citizens of Mo.; Wm. A. Pendleton, assignee, a citizen of Ky.; Thomas G. Hanley, a citizen of Virginia; M. L. Bowlin and Wm. Bowlin, partners under the style of M. L. Bowlin & Co., citizens of Indiana; W. H. White, a citizen of Georgia; J. B. Bagby, a citizen of Virginia; F. G. Dolon and C. F. Miller, partners under the style of Dolon & Miller, citizens of New York; Lizzie Schnitzen and Jno. Gay, partners under the style of Lizzie Schnitzen & Co., citizens of Missouri; P. L. Gray, master commissioner; J. L. Gleaves, Commonwealth's attorney of Wythe county; H. B. Maupin, receiver; H. J. Heuser, late receiver; I. C. Fowler, G. B. Thomas, G. J. Holbrook, W. L. Stanley, J. A. Walker, M. M. Caldwell, A. A. Campbell, W. S. Poage, Robert Crockett, J. J. A. Powell, W. H. Bolling, J. L. Kelly, and The Wytheville Insurance and Banking Company, its officers and agents, all of whom are citizens of the State of Virginia, and Paul Hutchinson, administrator of Chas. Hutchinson, deceased, a citizen of Iowa, if he be found in your district, to be and appear in the circuit court of the United States for the western district of Virginia, at Abingdon, on the first Monday in August next, to answer a certain bill in chancery, with injunction thereto, filed and exhibited in said court against Blount and Boynton and the other above-named parties by Hun G. Wadley, a citizen of the State of North Carolina.

Hereof you are to fail not, under penalty of the law therein ensuing, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 20th day of June, 1894, and in the 118 year of the Independence of the United States of America.

A copy.

[Seal United States Circuit Court, Western District of Virginia.]

Teste: I. C. FOWLER, *Clerk.*

22 Endorsement on spa.

"In the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

PAUL HUTCHINSON, Adm'r of Chas. Hutchinson, Dec'd, *et al.* *vs.* THE WYTHEVILLE INSURANCE & BANKING COMPANY,	On Original Bill in Equity.
and	
BLOUNT & BOYNTON *et als.* *vs.* H. G. WADLEY *et als.*	On Amended, Supplemental, and Cross Bill in Same Suit.

This day came H. G. Wadley, one of the defendants in the above proceedings in equity now pending in the above-named court, and he presented his bill for an injunction in his name against said Blount and Boynton *et als.*, and this said bill being duly sworn to by H. G. Wadley and fully supported by the affidavits of J. H. Gibboney, H. J. Heuser, and J. B. Barrett, Jr., the cause came on this day to be heard upon said bill for injunction and upon all the exhibits filed thereto and upon a transcript of the record of said original bill and said amended, supplemental, and cross bill above named, and upon reading said bill and affidavits and the said exhibits and transcripts the court is of opinion that the equity jurisdiction of the United States court above named first attached to both the persons and the subject-matter involved in said suits in equity, and that it is improper that the records of the pleadings, proofs, books, and papers filed in and parts of said equity suits now in litigation and pending unadjudicated in this court between said parties, or copies thereof, should be withdrawn therefrom and used by any one in any criminal or other proceeding in any other court against the said party to any of said suits in regard to any matters in issue in said suits in equity until the same have been fully adjudicated by this court, and it appearing to this court from said bill for injunction that such has been done and is now threatened by parties to said suits in equity for use in a criminal proceeding just begun by them in the county court of Wythe county, Virginia, against said H. G. Wadley for matters involved in and growing out of said suits in equity which were first instituted and are still pending in litigation and undetermined in this court, it is ordered that an injunction be awarded to said H. G. Wadley, according to the prayer of his bill; and it appearing to the court that the defendants in said bill are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

But before this injunction shall take effect the said H. G. Wadley will execute a bond before the clerk of the court in the penalty of $1,000.00, conditioned according to law, with N. L. Wadley as his

surety, who is approved as such surety, proof of her solvency being now made.

[Seal United States Circuit Court, Western District of Virginia.]

N. GOFF,
Circuit Judge.

June 8th, 1894.

To I. C. Fowler, clerk United States circuit court, Abingdon, Va.

23 The prayer of the said bill, according to which this injunction is awarded, as *recirws* in above decree, is as follows: Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed for, and that they may answer to the matters stated and charged, the prayer of your orator is that this bill of injunction and for relief be treated as incidental to said suit now pending in your honor's said court at Abingdon; that your honors may grant a writ of injunction, issuing out of and under the seal of this honorable court, restraining and enjoining, under the penalty for a violation thereof, all of the defendants to this bill, including their attorneys, clerks, and agents, either directly or indirectly, through their own agency or through the agency of others, from in any manner using against orator in any other court, State or Federal, in any other case, civil or criminal, the said deposition of your orator aforesaid taken in said suit in equity, or any copy thereof, or the report of Master Commissioner Gray taken or filed therein, or any copy thereof, or any of the books, papers, records, or correspondence, or any copies thereof or extract therefrom, of the Wytheville Insurance & Banking Company in the possession or that came under the control of said Gray, commissioner, or of H. J. Heuser, late receiver, or H. B. Maupin, present receiver, or of I. C. Fowler, clerk, in said equity suit that was brought in this court by said creditors; that your honor will likewise enjoin each and all of said defendants, creditors, who are now parties by the decrees of this court in said suit in equity now pending in this court, whether they are parties to the original bill or are plaintiffs in the amended, supplemental, and cross bill, or whose claims have been allowed by or presented to the master commissioner, Gray, for his allowance, together with all their attorneys, clerks, or agents, either through their own agency or acts or through the agency or acts of others, and also the said J. L. Gleaves, the Commonwealth's attorney of Wythe county, Virginia, eith- by himself or by the agency of others, and said Commissioner Gray, Receivers Heuser and Maupin, and said Clerk Fowler, by themselves or their agents or deputies, from all further prosecution of or participation by them or by either of them in the original procedure now pending in the county court of Wythe county, Virginia, in the name of The Commonwealth of Virginia *vs.* H. G. Wadley, upon an indictment for an embezzlement of the assets of the Wytheville Insurance & Banking Company, the said creditors having already submitted themselves and their claims affected by or involved in said criminal

procedure by their bill in equity to the prior jurisdiction of this court; that your honor upon final hearing of this cause will punish the parties involved for their unjust and unlawful misuse of the records of this court in said equity suit for the promotion and prosecution by said creditors of said original procedure against your orator now pending in the said county court of Wythe county, Virginia, put on foot by said creditors and their attorneys."

A copy.

[Seal United States Circuit Court, Western District of Virginia.]

Attest: I. C. FOWLER, *Clerk.*

The above-required injunction bond was this day executed by H. G. Wadley, with Nannie L. Wadley as his surety, in the penalty of $1,000, conditioned according to law.

June 20, 1894.

I. C. FOWLER, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of the said court at Abingdon aforesaid on or before the day to which this writ is returnable the complaint will be taken against them as confessed, and a decree entered accordingly.

I. C. FOWLER, *Clerk.*

24 As a further reason for the relief asked for in this petition, plaintiff would aver that in the said cause of Blount & Boynton *versus* H. G. Wadley *et al.*, in which account was referred to Preston Lewis Gray, master commissioner, the said master has for quite a year been at work upon his report and has taken much testimony for both complainant and defendants therein and filed his report about the first of April, 1896, in the clerk's office of the United States circuit court, at Abingdon, Va., to which complainant filed quite a number of exceptions; and that case came on to be heard before the Honorable John Paul, sitting as circuit judge, at Abingdon, Va., on the 24th day of July, 1896, upon the said report of the master, exceptions of petitioner filed thereto, and the said honorable judge sustained each and every exception of said petitioner except the naked objection as to the incompetency of the said master to act, as to which he overruled this said exception; and the said creditors were decreed to pay $1,060.00 costs to the master for said report and the case, by an order of reference as of 24th July, 1896, was recommitted to Commissioner Gray to retake and restate and again report the matters contained in said reference, the court having by its decree excluded all the testimony of the creditors and held that the report of the commissioner was erroneous and wholly contrary to equity.

The report being recommitted puts the case back to the original order of reference and it will take a great length of time, if ever it is done, to retake, restate, and again report said account according to the late order of reference of Judge Paul; and petitioner says that on account of this increased delay in that case, superinduced

by the acts of the said creditors, it would be grossly unjust to require petitioner to be held in the said county court of Wythe county, Virginia, for this additional great length of time and subject him to the expense of coming from his home in Wilmington, North Carolina, to Wytheville, Virginia, to renew his bail bond monthly or at frequent periods in said county court, for said creditors were prohibited, as before stated, from all further prosecution of said indictment against your petitioner. A certified copy of said late recommitment of said report by Judge Paul to said Commissioner Gray is herewith filed, marked Exhibit No. "E."

Petitioner would further show that the time for an appeal from the decree of the circuit court of the United States in said injunction cause of H. C. Wadley *vs.* Blount & Boynton *et al.* of 31st January, 1895, has long since expired, for the motion of creditors was to dissolve said injunction and be permitted to proceed with said prosecution; but said court by its decree of 31st January, 1895, refused said motion to dissolve, sustained the bill, and, in fact, adjudicated the matters in behalf of the petitioner.

Under the law regulating appeals in matters of granting or dissolving or refusing to dissolve injunctions an appeal from the action of this court in refusing to dissolve said injunction as such should have been taken within thirty days from said 31st day of January, 1895, and an appeal upon the merits of said case should have been taken within six months from said 31st January, 1895, to said circuit court of appeals of the United States, which period has likewise long since expired; and thus the said matter of the refusal to dissolve the injunction of Honorable Judge Goff enjoining the said proceedings on said indictment in said county court of Wythe is not only *res adjudicata* by a final decree, but the period for an appeal from it in every aspect has long since elapsed, and it would be unjust to perpetually hold petitioner in said county court of Wythe, even though the parties were not proceeding in contempt and violation of this court's order hereinbefore shown.

For these several reasons your petitioner comes into this court for the relief now to be asked.

Being aggrieved by the premises, your petitioner files this his petition in said equity cause of H. G. Wadley *vs.* Blount & Boynton *et al.* and prays that it may be taken and considered as a petition in and part of said cause; that notice be given to each of said creditors and their said counsel named in said subpœna, and also to Robert Sayers, Jr., Commonwealth's attorney, of Wythe county, Va., to appear before your honorable court at an early day and show cause why the said petitioner should not be discharged from the custody of said county court of Wythe county, Virginia, or why they should not be further required to absolutely refrain from all further exaction of bail from your petitioner and from any commitment of him to said county jail, and why they should not absolutely refrain from all further participation in or prosecution of said indictment by entering any order of any kind in said cause until the further order of this court, and that the said creditors answer for contempt of this court in violating the said decree of the

31st January, 1895, and that your honor will enter such orders and do such things as may be necessary to maintain its authority and enforce its decree and protect itself from the co-temptuous violation and disregard of its decree by said further prosecution of said indictment in the manner aforesaid; and, as sais creditors are numerous, your petitioner prays that copies of an order to appear and answer this petition may be served upon counsel of record in this cause, and that such service may be equivalent to personal service on such creditors, and that your honor will enter all such orders and do all such things as may be necessary to maintain the jurisdiction of your honor's court and to enforce the said decree of that court which has been so flagrantly violated and disregarded as aforesaid.

And for all such other, further, and general relief as the nature of his case may require and to equity may seem meet and proper. Petitioner files herewith a transcript of the record of the county court of Wythe county since the issuance of said injunction and service thereof, to wit, from the 9th day of July, 1894, when the first order thereafter was entered in the said county court of *of* Wythe county, Va., on said indictment, and it is marked Exhibit "E" as a part of this petition.

And, as in duty bound, he will ever pray, &c., &c.

H. G. WADLEY.

JOSEPH C. WYSOR,
D. F. BAILEY,
BLAIR & BLAIR,
Counsel for Petitioner.

UNITED STATES OF AMERICA, *State of North Carolina, City of Wilmington,* } *To wit:*

H. G. Wadley, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements made therein are true as he verily believes.

H. G. WADLEY.

Sworn to by H. G. Wadley before me and by me subscribed on this the 17th day of July, 1896.

THOMAS EVANS,
[NOTARY SEAL.] *Notary Public, County of New Hanover, State of North Carolina.*

The undersigned, counsel of H. G. Wadley, the foregoing petitioner, do hereby certify that they are regular practitioners in the United States circuit court for the western district of Virginia; that they are fully acquainted with all the facts set forth in the foregoing petition, and that in their opinion the said petition sets forth sufficient grounds for the relief prayed for by the said petitioner, and that in their opinion sais relief should be granted him.

Given under our hands this the — day of July, 1896.

JOS. C. WYSOR.
D. F. BAILEY.
BLAIR & BLAIR.

26 "EXHIBIT "B."

"B." Filed Aug. 6, 1896, with petition to Simonton for inj.

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Va., this January 31, 1895.

H. G. WADLEY, Plaintiff,

vs.

BLOUNT & BOYNTON and KATE NETTLES, C. C. Fargo, American Biscuit Manufacturing Co., Desha Bank, Assignee Batesville Flouring Mill; Newfield Manufacturing Company, Amanda J. King, Jordan Bros., H. S. Sheppard, J. P. M. Cox, M. N. Gray, J. S. Vaughn, Roanoke Mineral Wool Company, B. G. Chandos, Administrator; J. J. Dubose, Paschal G. Pratt, J. W. Kester, The Block Company, Andy Johnson, Hall & Hayward Company, M. C. Pink & Company, Stevenson, Alexander & Co., Assignees W. T. Carter & Co., Adel Pino Bros., R. Kimball, S. D. McMillan, Richardson, Howe & Lovejoy, Jacob Ferman, Eli Dowell Manufacturing Co., Art Publishing Co., Western Brass Manufacturing Co., Charles Betcher Lumber Company, A. Martin, Ryan & Maloney, Charles Thompson, Spalding, Miller & Company, William A. Pendleton, Assignee; Thomas G. Handley, M. L. Bowlin & Co., W. H. White, J. N. Bagby, Dolan & Miller, L. Schnitzen & Co., Sarah A. Horton, Sarah A. Horton & Bell Brown, D. C. Williams, Charles Wisisiker, for Wm. Moorham, Assignee; W. H. Waddill, Lantern Globe Co., J. B. Green, J. Crane, Rodefer Bros., Leibler & Mass, A. Jameson & Co., Matilda Lampheimer, S. Baker, for S. Halle & Sons; W. H. Rice, John C. Kingston, Anna B. & T. J. Walker, College Press Brick Works, Beatyville Lumber Co., Joseph Williams, Jr., W. D. Jemes, D. B. Alexander, Mener Newman & Emil Hart, Hiram A. Miller, Mrs. F. S. Cox, B. Broughton, A. S. Gatewood & Brother, S. Krassnoff, Meyer Jonason & Co., Robertson & Hall, Chicago Refining Oil Company, Norwich Ship & Lumber Co., Ogdensburg Terminal Co., Alpheus Hinton, E. Parks, Alden Vinegar Co., Johnson & Sharp, Chong Kee & Co., E. E. Smith, Assignee of H. Penner; Obendorfer & Co., Defendants.

In Equity on an Injunction.

[On the margin:] Parties therefore, but found part.

This cause, in which a preliminary injunction was her-tofore

awarded by this court on the — day of June, 1894, as shown by the said order entered therein, came on again this day to be heard upon the bill of complaint, with the affidavits of Hun G. Wadley, J. Hal. Gibboney, H. J. Heuser, and J. B. Barrett, Jr., annexed thereto; upon all the exhibits named and referred to in said bill, which are duly filed and exhibited therewith, including the entire record and proceedings in the case of Paul Hutchinson, administrator, etc., *vs.* The Wytheville Insurance & Banking Company *et al.*, the petitions of creditors filed therein, praying to be made parties, and the supplemental, amended, and cross bill filed therein, with all the exhibits filed with them; upon the demurrer and answer of Blount & Boynton and all the other defendant creditors; upon the separate answer of J. L. Gleaves, the Commonwealth's attorney of Wythe county, the latter having appeared in person at the taking of the depositions and at the several states of the case and participated in the argument of the case; upon the exceptions of plaintiff to the said demurrer and answers, because neither of the said answers nor the said demurrer is sworn to by any one, nor is the said demurrer certified to by any attorney, as required by the rules of this court; upon the joinder of the plaintiff in the said demurrer and upon the general replication of the plaintiff to each of the said answers; upon the depositions of witnesses taken by the plaintiff before Special Examiner W. B. Coleman, appointed for that purpose by an order entered in this cause, and upon the deposition- of witnesses taken by the defendants before W. B. Kegley, a notary public, and upon all the exhibits named and
27 referred to in all the depositions, both of the plaintiff and defendants, which was certified by the said special examiner or the said notary public; upon the written notice of the defendants to the plaintiff of a motion to dissolve the said injunction, which motion to dissolve, by consent of all the parties, by counsel, was adjourned and continued without further notice until August 29, 1894, when came the plaintiff, by his counsel, and the defendants, by their counsel, and the said J. L. Gleaves in proper person, and the said J. L. Gleaves asked and obtained leave to withdraw his answer; whereupon the said motion to dissolve the said injunction was fully argued by counsel for the plaintiff and by counsel for the defendants and by the said J. L. Gleaves, Commonwealth's attorney, and the court, not being advised what order should be entered in the cause, took time until this day to consider thereof.

Whereupon, upon consideration of all the foregoing records, pleadings, proofs, exhibits, and arguments of counsel, for the reasons stated in writing and filed herewith as a part of this order, the court is of the opinion and doth hereby adjudge, order, and decree that the motion to dissolve the said injunction be, and the same is hereby, overruled, and doth adjudge, order, and decree that the said injunction should not be dissolved, and doth further adjudge, order, and decree, for the reasons stated in the opinion filed herewith, that the bill of the plaintiff be sustained, and that the injunction heretofore granted shall continue in force, and the court being of the opinion that the equity jurisdiction of this court first attached to both the

parties and the subject-matter involved in this litigation, and that it would be unjust, improper, and illegal to allow the use of any of the pleadings, proofs, and papers filed therein, or of any of the records exhibited therewith, or any of them, or copies of any of them, in any proceedings, civil or criminal, in any other court against any party to this suit, while it is pending in and is unadjudicated by this court, it is adjudged, ordered, and decreed that an injunction do issue further restraining any such use and enjoining all the parties hereto, including their attorn*ies*, clerks, and agents, either directly or indirectly, and the attorney for the Commonwealth of Virginia for Wythe county, from all further prosecution of the indictment now pending in the county court of Wythe county, Virginia, in the name of The Commonwealth of Virginia *vs.* H. G. Wadley, in which he is charged with the embezzlement of the funds of the Wytheville Insurance and Banking Company, until the final hearing shall have been had and the final disposition made of the said cause of Paul Hutchinson, administrator, etc., *vs.* The Wytheville Insurance & Banking Company *et al.*, and of the petitions, and of the supplemental, amended, and cross bills filed therein, and until the further order of this court.

For the reasons mentioned in the written opinion of this court the plaintiff's bill is fully sustained. Other questions, interesting in character and of great importance, are raised by the plaintiff in his bill and were discussed by counsel, but the court does not now find that their consideration is necessary to the disposition of this cause, and therefore, without adjudicating them, the plaintiff is given the right hereafter, without any prejudice to him, to make such further presentation of them to this court as he may be advised it is proper to do; and it is further adjudged, ordered, and decreed that the plaintiff, H. G. Wadley, do recover from the defendants, being the creditors, all the costs expended by him in this cause, which will be taxed by the clerk and for which the said H. G. Wadley may have his execution; and it is further adjudged, ordered, and decreed that a copy of this order be served upon the counsel of record in this cause *ord in this cause* or by order
28 of publication, as the plaintiff my elect.

And this cause is continued.

NATHAN GOFF,
U. S. Circuit Judge.

To I. C. Fowler, clerk United States fourth circuit court, at Abingdon, Va.

January 31st 1895.

29 Ex. "D."

(Paper No. 3.)

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

H. G. WADLEY
vs.
BLOUNT & BOYNTON *et al.*

Opinion and Decree of Hon. Nathan Goff, Judge of the Circuit Court of Appeals of United States for the Fourth Circuit, Sitting in Circuit at Abingdon, Va.

Subjects:

1. Prior jurisdiction of Federal courts maintained.
2. When Federal court can enjoin criminal prosecution in State court.

30 In the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

H. G. WADLEY
vs.
BLOUNT & BOYNTON *et al.* } In Equity.

D. F. Bailey, Joseph C. Wysor, Blair & Blair, counsel for plaintiff.
J. A. Walker, M. M. Caldwell, J. L. Gleaves, counsel for defendants.

Opinion.

GOFF, *Circuit Judge:*

This cause is before me on motion of defendants to dissolve the injunction granted on the 8th day of June, 1894, as prayed for in plaintiff's bill. In order to fairly understand the questions involved in this controversy and to appreciate those now disposed of, it is necessary that the main points raised in the case of Paul Hutchinson, adm'r of Charles Hutchinson, dec'd, *et al. vs.* The Wytheville Insurance and Banking Company, and in the petition filed therein in the name of Blount & Boynton and others, against said defendant and others, as also in the amended and supplemental bill, in the nature of a cross-bill, filed in said cause, by Blount & Boynton *et al. vs.* H. G. Wadley and others, to all of which reference is made in the pleadings and exhibits of this case; it being in fact a pro-
31 ceeding filed in and made a part of said original cause,—should be referred to and briefly set forth.

The first-mentioned bill was filed on the fifth day of October, 1893, by Paul Hutchinson, a citizen of the State of Iowa against "The Wytheville Insurance and Banking Company," a corporation organized under the laws of the State of Virginia, and doing business at Wytheville, in the western district of Virginia.

The object of the suit was to ascertain the liabilities of said company, which was alleged to be insolvent, to secure the appointment of a receiver, and for such action as is usual in what is known as a creditor suit. On the 6th day of October, 1893, the court appointed H. J. Heuser, receiver, of the assets of such company, directing him to take charge of its property and see to the management of its business, and he duly qualified as such, proceeding with the discharge of the duties assigned him.

On the 18th and 19th days of the same month Blount & Boynton and other creditors of said Wytheville Insurance and Banking Company, filed their petitions in said cause and at their request were made parties complainants therein, they claiming that they had valid claims against said company, which were set forth, amounting to many thousand dollars in the aggregate; they charged mismanagement of the business affairs of the company, asking for the appointment of a master commissioner, the removal of the receiver, and for other action and relief, not required to be fully alluded to here. The court refused to remove the receiver, but appointed Preston L. Gray as master, with instructions to investigate the conduct of the affairs of said company, in what way it had been
32 managed, and of what its assets consisted: also that he ascertain in what manner the funds of the company had been invested and how the same had been disposed of; that he report the liabilities of the company, showing the sums due its policyholders and other creditors; the amounts theretofore paid its officers as salaries; in whose name the funds of the company have been kept, and such other matters relating to the business of said company as any party to the suit might request.

The said master after due notice to the parties proceeded to execute the order of the court, for that purpose taking charge of the books, papers, correspondence and records of the company, and calling and examining as witness the plaintiff H. G. Wadley, relative to his management of the business affairs of such company, of which he had been president. The said Wadley was so examined on the 8th day of February, 1894, being fully questioned by the master, by counsel for said company and also by his own counsel as well as those who represented the creditors, the same being in the form of a deposition taken before said master.

The object of this examination was to fix an individual liability of said Wadley, by showing the unlawful disposition by him of the assets of the Wytheville Insurance and Banking Company.

The master filed his report on the 27th day of April, 1894, in which it is set forth that Wadley is indebted to the company in the sum of $196,342.24. On the 25th day of May, 1894, the said creditors filed an amended and supplemental bill, against such company, Wadley, and others, rendered necessary or advisable, it was supposed,
because of the developments brought out by the examination
33 before and the report made by the master, the intention being to secure a personal decree against said Wadley for the sum so shown by the master, of his indebtedness to the company. On the 29th of May, 1894, on the motion of such creditors, the court

removed Heuser, as receiver, and appointed to succeed him H. B. Maupin, and also recommitted the report to the master in order that additional proof relative to certain claims against the company might be taken. Numerous exceptions have been noted to the master's report, all of which are as yet undisposed of. The suit is still pending and the questions raised by the pleadings and proofs are unadjudicated.

On the 16th day of May, 1894, in the county court of Wythe county, Virginia, an indictment against said H. G. Wadley was returned by the grand jury then attending that court in which he was charged with the embezzlement and misappropriation of the funds of the Wytheville Insurance and Banking Company in the particular instances and amounts, as reported by the said master in his report so filed in this court. The bill I now consider, was presented on the 8th day of June, 1894, in which after reciting much of the history of the litigation to which I have made reference, it is charged that the same creditors — so submitted themselves to the jurisdiction of this court, and who so petitioned this court to consider and adjudicate the matters referred to in said suits, are the identical parties who, acting by counsel employed by them for that purpose—the same counsel who so represented and now represent such creditors in this court, caused said indictment to be instituted and are now conducting the criminal prosecution founded thereon, and also it is charged therein that the same matters, rights, and issues are involved in said criminal proceed-
34 ure, as are set forth in the civil pleadings so theretofore submitted by such creditors to the determination of this court, that Wadley is the same person pursued by them, in their proceedings in the civil suits in this court and in the criminal proceeding in the county court of Wythe county, Virginia. It is also alleged that Wadley has been taken into custody by the said court, and is now held under a bail bond to appear and answer said indictment. And it is further charged that after said master had made up his report, and when the nature of the same and the contents thereof had been communicated to said creditors, that they and their counsel, after consultation together, decided to and did offer a proposition for the settlement of the debts mentioned in the report, to the said Wadley, they agreeing to accept fifty cents on the dollar in full satisfaction of their said claims, the said offer being communicated to Wadley by a committee of the creditors appointed for that purpose at the consultation alluded to, and being by him promptly rejected—it being set forth in the same, which was reduced to writing, that it was only to remain in force for the period of ten days. The plaintiff now charges that said offer was intended as a threat, the effect being to intimidate him, and force him to pay the debts of said company. The said proposition showing the terms thereof, the names of the creditors who participated in it, and the counsel who represented them, is filed as an exhibit with the bill, in which it is also charged that after the plaintiff's deposition was taken by the said master, and before the said meeting of creditors was held and their offer of adjustment made to him, that he was threatened by

them with a criminal prosecution if he did not settle with them the debts they claimed to be due and payable to them by said company.

It is also alleged in the bill that such creditors procured a
35 copy of the report as made by Master Commissioner Gray, the same not having as yet been submitted for the action of this court, and used it as evidence before said grand jury, portions of it having been read for that purpose to such jury by counsel for said creditors, who had caused themselves to be summoned as witnesses in order to thereby obtain the finding of the indictment against Wadley. It is also charged that they also so used a copy of the deposition of the plaintiff, so taken by the master, and now filed in said cause.

The plaintiff insists that his rights as a citizen of the United States were thus violated, as it is provided in the fifth amendment of the Constitution that no person shall be compelled in any criminal case to be a witness against himself, and that in pursuance of this provision the Congress has enacted section 860 of the Revised Statutes, prohibiting the use of pleadings and evidence taken in judicial proceedings as testimony in criminal prosecutions. As I dispose of this case on other grounds, I will not discuss the questions relating to the use of copies of the master's report and plaintiff's deposition in the criminal proceedure in Wythe county court in the State of Virginia, but in passing them by will remark that I cannot conceive of any proper way by which papers could have been used as evidence before the grand jury of that county—under the circumstances as set forth in the bill and proceedings of this cause—and but for the uncontradicted testimony of a number of witnesses, I would not think it possible that such action could be had before any grand jury duly in session under any court in this country. Nor will I intimate by any ruling on the matter at this time, that

any court of the State of Virginia will during the trial of a
36 criminal cause, permit such copies or evidence of that character, to be offered for the consideration of the jury. Should I be mistaken in this, the remedy would I think be plain, and the relief without doubt. There are other allegations in the bill relative to the action of said creditors, and the rights of the plaintiff, but I do not find it necessary to allude to them now.

On consideration of the bill, the exhibits and the proceedings had in the original cause, I directed an order, in substance restraining the further prosecution of said indictment until the matters referred to by plaintiff could be heard and determined by this court. The creditors have filed their joint answer, in which they admit the allegations of the bill relative to the proceedings in this court in the suit of Paul Hutchinson, adm'r, &c., *vs.* The Wytheville Insurance and Banking Company, and their connection with the same; they admit that this court to the fullest extent obtained complete jurisdiction over the subject-matters of and the parties to said suit, but they insist that Wadley himself was not a party thereto; they admit the examination of Wadley before the commissioner, and his cross-examination by their counsel, and claim that he was not called by them, but that he voluntarily submitted himself for such ex-

amination. A considerable portion of their answer is devoted to a statement from the standpoint of said creditors, of the manner that Wadley managed the business affairs of the companies with which he was officially connected, especially the Wytheville Insurance and Banking Company, and they set forth how it was that he despoiled it and them of their assets. They admit the offer of compromise and deny making threats of criminal prosecution, or that their counsel procured themselves to be summoned as wit-
37 nesses before the grand jury, or that they read a copy of said depositions before it; they also admit that they employed counsel to assist the attorney for the State in the prosecution of the indictment returned against Wadley in the county court of Wythe county, insisting that it was entirely proper for them to do so.

Other statements in the answer I do not deem it necessary to call attention to now. The defendant J. L. Gleaves files his separate answer in which he claims that he is the attorney for the Commonwealth for Wythe county, Virginia, and that it is his duty to prosecute said Wadley on the indictment so found, and that this court has no right, authority or jurisdiction to enjoin and prohibit him from so doing. He claims that he was not a party to the litigation pending in this court, and not familiar with the proceedings had therein, and he admits that this court obtained in proper and lawful manner complete jurisdiction over all the parties and the issue involved in the suit of Hutchinson, adm'r, &c., *vs.* The Wytheville Insurance and Banking Company. He denies that the creditors who submitted themselves to the jurisdiction of this court, are the parties who are conducting the criminal proceedings against Wadley, and insists that the State of Virginia, acting through her grand jury instituted the same, and that he in his official capacity has charge of it. He also denies that any "Federal record" was unlawfully used in procuring said indictment, but that it was returned on the evidence of witnesses regularly summoned by him for that purpose. The other matters set forth in the answer of defendant Gleaves as to what transpired in the county court of Wythe county, subsequent to the finding of the indictment against Wadley,
38 or as to what can be made to appear from the books, records and papers of the Wytheville Insurance and Banking Company, relative to his misappropriation of the funds of that institution, are not material to the points on which I think this case must be decided.

After examining the entire record in all the mass of litigation drawn into this controversy, I find that so far as the questions now presented are concerned, that the greater part thereof can be eliminated as not germane, and that the real issue is a simple one, elementary in character, not "startling and unusual" as counsel have claimed,—the decision of which follows as matter of course, when we apply the facts as found and admitted, to the law about which there is no controversy. That this court by proceedings instituted in October, 1893, obtained jurisdiction over the property of the Wytheville Insurance and Banking Company, and over the parties to said suits, including those who came in by petition as well as

those who appeared before the master, is I think beyond controversy. The court took the assets of said company into its custody, and placed them in the possession of its receiver, and it directed its master to make and state an account, showing what application had been made of the funds of the company, where the same were, who the creditors are and the sums due them. In executing this order of the court, the master had all the creditors of the company before him, as well as the company itself, and Wadley, the president thereof, as to whom the said creditors were endeavoring to make such a case as would establish his individual responsibility for their claims. That the order of this court justified such proceedings before the master, the creditors, their counsel and the master evidently believed and the court is not now disposed to differ with them. That
39 Wadley himself was, after the filing of the petitions by Blount & Boynton and others, in October, 1893, in which he was charged with misappropriation of the funds of said company, and required to answer the special interrogatories therein propounded, and defend himself before the master, in effect a defendant to said suit, is well established by the authorities: Buerk *vs.* Imhaueser, 8 Fed. Rep. 457; Carter *vs.* The City of New Orleans, 19 Fed. Rep. 659; Seegee *vs.* Thomas, 3 Blatchf. 11, Fed. Cases § 12633; Anderson *vs.* Watt, 138 U. S. 694.

Under all the circumstances of this case it would be inequitable to permit the creditors who filed their petition against Wadley, and who insisted before the master, that he was individually responsible and liable to them for their debts against said company, to now contend that the one who has been so proceeded and reported against is not and has not been a party to the suit. They are estopped in a court of conscience from making such a claim, by their words and acts, and by the record they have made in this case. Independent of this, the cross-bill makes Wadley a formal party to the litigation, subjecting him beyond all question to the jurisdiction and decree of the court, and entitling him to its protection relative to all matters affecting the questions fairly involved in the pleas yet to be determined by it.

The question then is shall a court which has first acquired jurisdiction of the parties to and the subject-matter of a controversy, retain the exclusive control of the same, until it has fully disposed of the questions raised by the pleadings before it? The authorities answer this question in the affirmative, the decisions are all one way and the rule is the same in both civil and criminal cases.
The only matter is as to the court first securing jurisdic-
40 tion. If that be a court of the State then the court of the United States must not and will not interfere. The State courts should observe the same rule, and they generally do. This court will not permit its process to be used, either civil or criminal, by parties engaged in litigation in the courts of the State of Virginia, relative to the subject-matter of such litigation, thereby impeding the administration of justice by rendering it impossible for those materially interested therein to properly prepare and submit their case for the decision of that court the jurisdiction of which

was first prayed for and granted, nor will it, I deem it proper to add, tolerate any such interference by the courts of that State with judicial proceedings regularly before it and exclusively within its jurisdiction.

The suggestion made in the answer of the attorney for the Commonwealth, that judicial comity requires that one court shall grant to another the use of its records and copies of the papers in its custody, and that it will also direct its officers to obey a *subpœna duces tecum* relative thereto, when satisfied that the same are material as evidence in a case pending in the court issuing such summons, is as a general proposition true, but it would be extending the matter of courtesy beyond reasonable limits for that court which has complete jurisdiction over a cause pending before and undetermined by it, to authorize or consent to the use by another court of the pleadings, commissioner's reports and depositions filed in said cause, before they have been considered for the purpose for which they were intended, it appearing also that the court so desiring them designs to use them in a case over which it had assumed jurisdiction even after the making and filing of the particular papers asked for, and which involved the same parties and
41 the identical subject-matter as does the case so before it. No precedent can be found for such a request, and I indulge the hope that no court will ever so rule as to furnish an authority that would justify such a proceeding.

It appears that the county court of Wythe county was fully advised of the pendency in this court of the litigation referred to, that it expressed a desire to prevent the improper use of copies of certain parts thereof before its grand jury, and that counsel called its attention to the fact that the matters set out in the indictment were the same as those involved in said suit, insisting at the same time that said indictment had been procured by the unlawful use of said copies, and also suggesting that the prosecution of the same, under the circumstances would be discourteous to this court. I trust I may be permitted to say that it would have been well had that court then have recalled and exercised the judicial comity to which its able and energetic prosecutor now so eloquently alludes.

On the question of jurisdiction, and the right of the court first acquiring it, to retain exclusive control of the subject-matter and the parties, until it has fully disposed of the questions submitted to it, if authority is desired, it can be found in the following cases: Union Trust Co. *vs.* Rockford, R. I. and St. L. R. Co. 6 Biss. 197, Fed. Cases 14401; Sedgwick *vs.* Menck, 6 Blatchf. 156 Fed. Cases 12616; Judd *vs.* Bankers' and Merchants' Tel. Co. and others, 31 Fed. Rep. 182; Schuele *vs.* Reiman, 86 N. Y. 270; Hagan *vs.* Lucas, 10 Pet. 400; Williams *vs.* Benedict, 8 How. 111; Taylor *vs.* Carryl, 20 How. 583; Freeman *vs.* Howe *et al.*, 24 How. 450; Buck *vs.* Colbath, 3 Wall. 334; Covell *vs.* Heyman, 111 U. S. 176; Heidritter *vs.* Elizabeth Oil Cloth Co. 112 U. S. 294; Rio Grande Railroad Co. *vs.* Gomilla, 132 U. S. 478.

42 I find from the testimony in the case, that after the creditors of the Wytheville Banking and Insurance Company

had intervened and been made parties complainants in the said suit of Paul Hutchinson, adm'r &c. against that company and others, and after they had proven their claims before the master and he had formulated his report, that they in a meeting called and held for the purpose of determining the proper course for them to pursue, in the light of the case as shown by said report and Wadley's deposition, concluded to submit to him, the said Wadley an offer to adjust the debts reported by said master, (as to which it was claimed he was individually liable,) at the rate of fifty cents on the dollar, at the same time having an understanding among themselves that if he declined such proposition that they would procure his indictment in the county court of Wythe county, and prosecute him for the misappropriation of the funds of said company,—the money required to carry on such criminal proceedure being arranged for at the same meeting that the offer of conference was agreed to. And also do I find that when such offer was declined by Wadley, that they proceeded to procure his indictment, using for that purpose a copy of his deposition so given before the master of this court, and evidently procuring the summoning of their counsel as witnesses before the grand jury (some of whom declined to go before that body unless they were first duly subpœnaed so to do) and having them assist in the preparation of the bill of indictment, and in the prosecution of Wadley under it. That the criminal proceedure when first suggested was intended to aid the creditors in adjusting their debts with Wadley is, I think without doubt, and the fact that the effort failed is, so far as the matter now before me is con-
43 cerned, immaterial. The circumstances were, it must be conceded, unusually anomalous, such as to naturally cause excitement and indignation, yet nevertheless as the evidence discloses conduct that cannot be justified and is far from being conducive to the fair administration of justice; that is in fact most reprehensible, dangerously near the borderland that divides impropriety from criminality, and I truly hope that never again in this jurisdiction will an effort be made to duplicate it.

We now have nothing to do with the questions which involve the guilt or innocency of Wadley, on the charges set forth in the indictment, or his liability because of mismanagement by him of the affairs of said Wytheville Insurance and Banking Company, as alleged in the proceeding before referred to. These matters in the regular discharge of judicial proceedure, in due time and place will be considered and disposed of. We are now concerned in seeing that all the parties to this litigation, plaintiffs and defendants, creditors and debtors, accusers and accused, shall each and all have every proper opportunity to fairly present their respective claims, and also that the court is neither delayed nor hampered in reaching a just conclusion.

If circumstances can exist under which it is proper for a court of the United States to restrain parties from prosecuting a case in a State court, they certainly are now before us, and that there are cases where it is entirely proper so to do has been declared by courts worthy of our confidence and commanding our respect. It is

claimed that section 720 of the Revised Statutes of the United States prohibits the granting of an injunction in cases like the one I now consider, but such insistence is without merit. That section is to be construed in connection with section 716, which gives
44 to the courts of the United States the power to issue all writs necessary to the exercise of their respective jurisdictions and agreeable to the usages and principles of law. If a United States court has first obtained jurisdiction of a case, it can then always take such action as may be required to maintain its authority and enforce its decrees, and under such circumstances section 720 of the Revised Statutes is not applicable. Fisk *vs.* Union Pac. R. Co., 10 Blatchf. 518 Fed. Cases 4830; French Trustee *vs.* Hay, 22 Wall. 250; Deitzsch *vs.* Huidekoper, 103 U. S. 494; Sharon *vs.* Terry, 36 Fed. Rep. 365; President, &c., of Bowdoin College *et al. vs.* Merritt *et al.*, 59 Fed. Rep. 6.

That an injunction may be issued under such circumstances is now well established by decisions, and that it may apply to a criminal as well a civil suit is not without precedent. A careful examination of the authorities leads me to the conclusion that, in cases where a criminal prosecution has been instituted while a civil suit was pending involving the same subject-matter, and the parties procuring the indictment are the same as those who instituted the civil suit, that the court whose jurisdiction was first sought and before which said civil proceedings is so pending and undetermined, will restrain the parties from prosecuting the indictment until it can hear and dispose of said suit.

In Story's Equity Jurisprudence, vol. 2, section 893, it is said: "There are, however, cases in which courts of equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings in any criminal matters, or in any case not strictly of a civil nature. As for instance, they will not grant an injunction to stay pro-
45 ceedings on a mandamus, or an indictment, or an information, or writ of prohibition. But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally from proceeding, at the same time upon the same matter of right, for redress in the form of a civil suit, and of a criminal prosecution. In such cases the injunction is merely incidental to the ordinary power of the court to impose terms upon parties, who seek its aid in furtherance of their rights."

In Beach's Modern Equity Practice, vol. 2, section 761, we find the following: "It is a rule of almost universal application both in England and in this country that a court of equity has no jurisdiction to restrain a criminal proceeding whether it be by indictment or summary process, unless the criminal proceedings be brought by a party to the suit already pending in the equity court and to try the same right that is in issue there."

On this subject see the following authorities: Turner *vs.* Turner, 15 Jurist, 218; Mayor of York *vs.* Pilkington, 2 Atk. 302; Lord Montague *vs.* Dudman, 2 Ves. 396; Attorney General *vs.* Cleaver,

18 Ves. 220; Kerr *vs.* Preston, 6 Ch. D. 463; Spink *vs.* Francis, 19 Fed. Rep. 670, and 20 Fed. Rep. 567; Eden on Injunct. ch. 2 p. 42; Jeremy on Eq. Jurisd. B. 3 ch. 2 p. 308; 3 Woods Lect. 56; 3 Dan. Ch. Pr. 1721; *In re* Sawyers, 124 U. S. 211, in which Mr. Justice Gray in delivering the opinion of the court said: "The modern decisions in England by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there."

46 & 47 From the reason mentioned I shall sustain the plaintiff's bill and continue in force the restraining order heretofore granted. Other questions interesting in character and of great general importance are raised by the plaintiff and are discussed by counsel, but I do not find that their consideration is essential to the disposition of this case, and therefore I shall not now allude to them. I will pass a decree declaring that as the equity jurisdiction of this court first attached to both the parties and the subject-matter involved in this litigation, that it will be improper to use the pleadings, proofs and papers filed herein, or any of them, or copies thereof, in any proceedings civil or criminal, in any other court against any party to this suit, while it is pending in and is unadjudicated by this court,—and an injunction may issue restraining such use and injoining all of the parties hereto, including their attorneys, clerks and agents, either directly or indirectly, and the attorney for the State for Wythe county, Virginia, from all further prosecution of the indictment now pending in the county court of said county, in the name of the Commonwealth of Virginia against H. G. Wadley in which he is charged with the embezzlement of the funds of the Wytheville Insurance and Banking Company, until the final hearing shall have been had and disposition made of the same cause of Paul Hutchinson, adm'r, &c., *vs.* The Wytheville Insurance and Banking Company and others, and the petitions and supplemental, amended and cross bill filed therein, and until the further order of this court.

January 31, 1895.

NATHAN GOFF,
U. S. Circuit Judge, Fourth Circuit.

A copy.
Teste: I. C. FOWLER, *Clerk.*

February 7, 1895.

48 In the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

H. G. WADLEY
vs.
BLOUNT & BOYNTON *et al.*
} In Equity. On an Injunction.

Decree.

This cause, in which a preliminary injunction was heretofore awarded by this court, on the — day of June, 1894, as shown by the

said order entered therein, came on again this day to be heard, upon the bill of complaint, with the affidavits of H. G. Wadley, J. Hal. Gibboney, H. J. Heuser, and J. B. Barrett, Jr., annexed thereto; upon all of the exhibits named and referred to in said bill, which are duly filed, and exhibited therewith, including the entire record and proceedings in the case of Paul Hutchinson, adm'r, etc., *vs.* The Wytheville Insurance and Banking Company *et als.*, the petitions of creditors filed therein, praying to be made parties, and the supplemental, amended and cross bill, filed therein, with all the exhibits filed with them; upon the demurrer and answer of Blount & Boynton and all the other defendant creditors, upon the separate answer of J. L. Gleaves, the Commonwealth's attorney of Wythe county, the latter having appeared in person at the taking of the depositions, and at the several stages of the case, and participated in the argument of the case; upon the exceptions of plaintiff to the said demurrer and answers, because neither of the said
49 answers nor the said demurrer is sworn to by any one, nor is the said demurrer certified to by any attorney, as required by the rules of the court; upon the joinder of the plaintiff in the said demurrer, and upon the general replication of the plaintiff to each of the said answers upon the depositions of witnesses, taken by the plaintiff, before special examiner, W. D. Coleman, appointed for that purpose by an order entered in that cause, and upon the depositions of witnesses, taken by the defendants before W. B. Kegley, a notary public, and upon all the exhibits named and referred to in all the depositions, both of the plaintiff and defendants, which were certified by the said special examiner, or the said notary public; upon the written notice of the defendants to the plaintiff of a motion to dissolve the said injunction, which motion to dissolve, by consent of all the parties by counsel, was adjourned and continued, without further notice, until August 29, 1894, when came the plaintiff by his counsel, and the defendants by their counsel, and the said J. L. Gleaves, in proper person; and the said J. L. Gleaves asked, and obtained leave to withdraw his answer, whereupon the said motion to dissolve the said injunction was fully argued by counsel for the plaintiff, and by counsel for the defendant, and by the said J. L. Gleaves, Commonwealth's attorney; and the court not then being advised what order should be entered in the cause, took time, until this day, to consider thereof.

Whereupon upon consideration of all the foregoing records, pleadings, proofs, exhibits, and arguments of counsel, for the reasons stated in writing, and filed herewith as a part of this order, the court is of the opinion, and doth hereby adjudge, order, and
50 decree that the motion to dissolve the said injunction, be, and the same is hereby overruled, and doth adjudge, order and decree that the said injunction should not be dissolved; and doth further adjudge, order, and decree, for the reasons stated in the opinion filed herewith, that the bill of the plaintiff be sustained, and that the injunction, heretofore granted, shall continue in force. And the court, being of the opinion that the equity jurisdiction of this court first attached to both the parties, and the subject-matter

involved in this litigation; and that it would be unjust, improper, and illegal to allow the use of any of the pleadings, proofs, and papers filed therein, or of any of the records exhibited therewith, or any of them, or copies of any of them, in any proceedings, civil or criminal, in any other court, against any party to this suit, while it is pending in, and is unadjudicated, by this court, it is adjudged, ordered, and decreed that an injunction do issue, further restraining any such use, and enjoining all the parties hereto, including their attorneys, clerks, and agents, either directly or indirectly, and the attorney for the Commonwealth of Virginia for Wythe county, from all further prosecution of the indictment, now pending in the county court of Wythe county, Virginia, in the name of The Commonwealth of Virginia *vs.* H. G. Wadley, in which he is charged with the embezzlement of the funds of the Wytheville Insurance and Banking Company, until the final hearing shall have been had, and the final disposition made of the said cause of Paul Hutchinson, adm'r, etc., *vs.* The Wytheville Insurance and Banking Company, *et als.*, and of the petitions, and of the supplemental, amended, and cross bill filed therein and until the further order of this court.

51 For the reasons mentioned in the written opinion of this court, the plaintiff's bill is fully sustained. Other questions interesting in character, and of great importance are raised by the plaintiff in his bill, and were discussed by counsel, but the court does not now find that their consideration is necessary to the disposition of this case, and therefore, without adjudicating them, the plaintiff is given the right, hereafter, without any prejudice to him, to make such further presentation of them to this court, as he may be advised it is proper to do so.

And it is further adjudged, ordered, and decreed that the plaintiff H. G. Wadley, do recover from the defendants, being the creditors, all the costs expended by him in this cause, which will be taxed by the clerk, and for which the said H. G. Wadley may have his execution.

And it is further adjudged, ordered, and decreed that a copy of this order be served upon the counsel of record in this cause, or by an order of publication as the plaintiff may elect.

And this cause is continued.

To I. C. Fowler, clerk United States circuit court, at Abingdon, Virginia.

January 31, 1895.

Endorsement.

Executed by delivering in person, at Wytheville, Va., a true copy of the within decree, on February 28th, 1895, to each of the following persons, to wit, James A. Walker, C. B. Thomas, W. A. Poage, J. J. A. Powell, W. N. Caldwell, W. H. Bolling, J. L. Gleaves, and on March 11th, 1895, on H. B. Maupin, receiver, by delivering a true

copy thereof to Robert Sayers, Jr., his clerk, at the office of said receiver.

G. W. LEVI, *U. S. M.*,
Per JNO. W. FICKLE, *D. M.*

Marshal's cost, $20.90.

52 EXHIBIT "No. E." Filed August 6th, 1896.

At an adjourned term of the circuit court of the United —, continued and held for the western district of Virginia, at Abingdon, Va., in the fourth circuit, on Friday, the 24th day of July, A. D. 1896.

Present: Hon. John Paul, district judge, presiding.

PAUL HUTCHINSON, Adm'r, &c.,
vs.
THE WYTHEVILLE INSURANCE & BANKING CO. } No. 216.

and

BLOUNT & BOYNTON, &c.,
vs.
H. G. WADLEY & Others.

This cause came on to be heard on this 24th day of July, 1896, upon the papers formerly read and the report of Standing Commissioner Preston Lewis Gray filed on the 30th day of March, 1896, and the exceptions filed to said report by H. G. Wadley and Mrs. Nannie L. Wadley, H. J. Heuser, Mary A. Heuser, John B. Barrett, and J. Hal. Gibbonny, and the argument of counsel.

On consideration the court is of opinion, and doth so adjudge, order, and decree, that the first exception, as to the commissioner being an improper person to take said account, is not well taken, and the same is overruled.

The second exception, as to want of proper notice, is well taken and is sustained.

The third exception, that the commissioner received as against the defendants H. G. Wadley and Nannie L. Wadley, parties defendant to the amended and supplemental bill, testimony taken on the original bill, to which they were not parties, is well taken and is and the same is sustained.

The 4th exception, as to the deposition of S. F. Ewald, is sustained, and said deposition is suppressed.

As to the fifth exception, with reference to the deposition of Mrs. Nannie L. Wadley, the court is of opinion, and so decrees, that the action of the commissioner in excluding said deposition was proper, but said exception is sustained upon the ground of surprise. The defendant should have been notified by the commissioner of his determination to exclude said deposition, in order to have had time to supply the place of the testimony excluded.

The court deems it unnecessary to pas- at this time upon the other exceptions to said report filed by the defendants, as they relate to

matters on which the commissioner will have to report, when the report is recommitted to him.

And the said report is recommitted to Commissioner Gray, who will take and state said account in accordance to the last decree of reference in this cause and report his proceedings to this court as speedily as practicable.

The defendants, H. G. Wadley and Nannie L. Wadley, J. Hal. Gibbonny, H. J. Heuser, Mary A. Heuser, and J. B. Barrett, except to the action of the court in overruling exception No. 1, and also in holding Mrs. Wadley an incompetent witness under the 5th exception.

53 EXHIBIT "C."

Decree. Filed August 6, 1896.

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

H. G. WADLEY, Plaintiff,
vs.
BLOUNT & BOYNTON *et als.* } In Equity, with Injunction.

This day came H. G. Wadley, by his counsel, Messrs. D. F. Bailey, Joseph C. Wysor, and Blair & Blair, and presented his petition in the above cause, which was duly supported by the affidavits of said H. G. Wadley and by the exhibits referred to in said petition, and they asked leave, which is hereby granted, that said petition be filed in this equity cause, and it appearing from said petition, said affidavit, and the exhibits filed with said petition, and which are duly certified, that by a decree of this court entered in the above-named equity cause in the chancery order book, at Abingdon, on 31st January, 1895, that this court, upon a bill of injunction and exhibits, answers and exhibits, depositions of witnesses, with exhibits and argument of counsel, upon a motion to dissolve the said injunction, refused to dissolve said injunction, but continued it in force and fully sustained the allegations of said bill, and especially enjoined and prohibited the defendants therein, all of whom are made party defendants to this petition, from all further prosecution of the said H. G. Wadley upon an indictment against him for the embezzlement of the assets of the Wytheville Insurance and Banking Company, pending in the county court of Wythe county, Virginia, this court holding that it had prior jurisdiction of all of the said parties and of the subject-matter set up in said indictment, and to which said bill all the creditors hereinafter named and J. L. Gleaves, the then attorney for the Commonwealth of Wythe county, Virginia, were parties defendant and appeared in and defended said cause; and it appearing from said petition, exhibits, and affidavits that a copy of said injunction was duly executed on all of them by the deputy marshal of said court, and that after the service of said decree upon them, expressly in terms, forbidding all further prosecution of said indictment against said H. G. Wadley in the county

court of Wythe county, Virginia, that the said creditors, by their special counsel, and the said J. L. Gleaves, then attorney for the Commonwealth, acting before July 1st, 1895, and his successor after 1st July, 1895, Robert Sayers, the present Commonwealth's attorney of said county, have persisted and continued to have the said indictment of Commonwealth *vs.* H. G. Wadley called up in said county court from term to term or time to time and have asked the court to enter orders in said cause to commit to the county jail in said county the said H. G. Wadley unless he would give bail with sureties conditioned for his appearance from term to term or time to time, over and against the protest of the said H. G. Wadley and his counsel; and it appearing to the court that by the action and the motion of the said creditors, by their counsel, and the said Robert Sayers, attorney for the Commonwealth, that the said H. G. Wadley, in order to avoid being committed to the county jail of Wythe county in said case, has, at the instance of said creditors and their special counsel and the said R. Sayers, Comm.'s att'y, been admitted to bail upon a bond in the penalty of $10,000.00, with V. C. Huff and Clarence Trinkle as his bailesmen, conditioned for the personal appearance of the said Wadley on the 10th day of August, 1896, before the said county court of Wythe county to answer said indictment in said county court, which proceeding the said H. G. Wadley by his petition claims to be a deprivation of his personal liberty, and that it is in violation and in contempt of the said decree of this court entered on the 31st January, 1895, in above cause of H. G. Wadley *vs.* Blount & Boynton *et al.*, and the petition stating repeated and continued proceedings against said Wadley for said bail or commitment in violation of his rights as a citizen of the United States, as well as in contempt of this court:

Now, upon the motion of said Wadley, by his counsel, the
54 said creditors and their said counsel, and J. A. Walker and C. B. Thomas, as special prosecutors, and Robert Sayers, the Commonwealth's attorney of Wythe county, Virginia, their agents and attorneys, or any one for them, or in any —, directly or indirectly, are hereby especially forbidden and enjoined in the future from exacting from the said H. G. Wadley any further bail or from asking or taking any further orders in the said case of Commonwealth *versus* H. G. Wadley, pending in the county court of Wythe county, Virginia, except a mere order of continuance, until the further order of this court; and upon the further motion of the said H. G. Wadley rules are hereby awarded against each of said creditors and their said counsel and the said special prosecutors and the said Commonwealth's attorney, Robert Sayers, returnable to the first day of October term, 1896, before this court, at Abingdon, Va., to show cause, if any they can, why they should not be fined or imprisoned, or both, for their violation of the decree of this court of the 31st January, 1895, in the cause of H. G. Wadley *versus* Blount & Boynton *et als.*, by failing to abstain from all further prosecution of said case, according to the mandate of said decree, and a copy of this order may be served upon said creditors in person or upon their counsel of record at the election of the said H. G. Wadley, and upon

said counsel and special prosecutors and the said Commonwealth's attorney in person; and the creditors in said petition enjoined and restrained by this order and said counsel and special prosecutors and said Commonwealth's attorney made parties to said petition and embraced in this order are as follows:

William M. Blount & Wm. Boynton, partners, trading under firm and style of Blount & Boynton, Bainbridge, Ga.; F. A. Seighardt, of State of New York; Mrs. Kate Nettles, Munroe, La.; Jas. R. & W. R. Sergeant, partners under firm name and style of Sergeant Bros., New Jersey; Sam'l Tieger, New York; C. G. Fargo, Hot Spring, S. Dk.; American Bis. & Mfg. Co., Chicago; The Desha Bank of Arkansas, Arkansas City; The Batesville Flouring Mill & Mfg. Co. of Arkansas; The Neield Mfg. Co. and N. Neufeld, of Illinois; Amanda J. King, of Florence, S. C.; A. M. & J. M. Jordan, partners under the name and style of Jordan Bros., Hitson's P. O., S. C.; H. S. Shephard, of South Carolina; J. P. M. Cox, Greenville, S. C.; W. N. Gray, of Philadelphia, S. C.; J. S. Vaughan, Winchester, Tenn.; T. A. Windle, Allisonia, Va.; Roanoke Min'l Wool Co., Roanoke, Va.; B. G. Chandos, adm'r, Oshkosh, Wis.; J. J. & W. B. Du Bose, partners under style of J. J. & W. B. Du Bose, of Florence, S. C.; Paschal P. Pratt, of Buffalo, N. Y.; J. W. Kiester, Va.; The Block Company, Pocahontas, Va.; Andy Johnson, Loudon, Ky.; The Hall & Hayward Company, Louisville, Ky.; M. C. & J. W. Pink, partners under firm — of M. C. Pink & Co., Md.; D. H. Stevenson & J. D. Alexander, partners under firm name of Stevenson, Alexander & Co., Md.; W. T. Carter, trading under firm name and style of W. T. Carter & Co., Stafford, Ala.; Silas Kilbourne and A. D. Fessender, partners under style of Silas Kilbourne & Co., Mich.; A. G. Bates, Mich.; P. B. Kushborth and Geo. J. Kushborth, partners under firm name of Kushborth & Son, who sue for the benefit of Edward and Geo. Hollanders, partners under firm name of Chas. Hollander & Sons, residents of Maryland; Paper Mill Co., State of Indiana; Chas. Weiseker, who sues for Wm. Moernam, his assignee, residents — St. of N. Y.; W. H. Waddill, Danville, Va.; Lantern Globe Co., Bellaire, O.; J. B Green, Bachelors' Hall, Va.; J. Crane, Mississippi; A. D. & T. A. Rodefer, partners under name of Rodefer Bros., Bellaire, O.; Theo. A. Liebler & A. J. Mass, partners under style of Liebler & Mass, 12 College Place, N. Y.; Andrew & R. W. A. Jameson, partners under style of A. Jameson & Son, Penn.; Matilda Lampheimer, Fannerville, La.; L. S. Baker, who sues for the benefit of Isaac, Moses, & Weyer S. Halle, partners under name of S. Halle & Sons, Maryland; W. E. Rice, Danville, Va.; John C. Kingston, Buffalo, N. Y.; A. B. and T. J. Walker, Walkersville, S. C.; College Hill Press Brick Works, Missouri; Beattyville Lumber Co., Ky.; Joseph Williams, Jr., Pittsburg, Penn.; W. D. James, Lunenburg, N. C.; D. E. Alexander, Bellwood, N. C.;
55 Mauer Newman & Emil Hart, Illinois; Hiram A. Miller, Humbleton, W. Va.; Mrs. F. S. Cox, Goldsboro, N. C.; W. S. Wells, Ohio; A. S. & G. H. Gatewood, Danville, Va.; B. Broughton, Chase City, Va.; S. Krasnoff, Berriville, S. C.; Meyer, Joseph Jonnasson and J. H. Rothschild, partners under firm name — Meyer,

Jonnasson & Co., 358 Broadway, N. Y.; J. R. Robertson & Thomas Hall, partners under name of Robertson & Hall, Phila., Penn.; Chicago Refining Oil Co., Chicago, Ill.; N. Martin, Chicago, Ill.; Norwich Shook & Lumber Co., Norwich, Vt.; Ogdensburg Terminal Co., N. Y.; Alpheus Hinton, N. C.; E. Park, N. C.; Alden Vinegar Co., St. Louis, Mo.; F. E. Johnson & Jas. B. Sharp, partners under style of Johnson, Sharp & Co., 23 W. 30th St., N. Y.; Wong Quong and Ah Chow, partners under style of Chong, Kee & Co., N. Y.; W. H. Baker and H. P. Colvard, Georgia; Mrs. J. A. Drake, Va.; J. P. Taylor, Va.; W. P. Patterson, Va.; J. D. Pettinger, Va.; M. B. Shands, trst. and assgn.; S. J. Lankford, Chilhowie, Va.; E. E. Smith, assgn.; H. Penner, Milwaukee, Wis.; Adel Pino Bros., Key West, Fla., for Western Nat'l B'k; R. Kimball, Saginaw, Mich.; S. D. McMillan, La Crosse, Wis.; T. L. Richardson, J. O. Howe, and T. M. Lovejoy, partners under firm name of Richardson, Howe & Lovejoy, Boston, Mass.; Jacob Ferman, Baltimore, Md.; Ely Doweel Mfg. Co., St. Louis, Mo.; Art Pub. Co., Gardner, Mass.; Western Brass Co., St. Louis, Mo.; Chas. Botcher Lumber Co., Detroit, Mich.; A. Martin, New Orleans, La.; W. H. Gooch, by W. D. Blanks, Va.; Mrs. J. A. Drake, Va.; J. D. Pettingill, Va.; V. P. Patterson, Va.; D. P. Taylor, Va.; W. D. Ryan and C. K. Maloney, partners under name — Ryan & Maloney, Va.; Chas. Thompson, Tenn.; T. R. Spaulding & T. F. Miller, partners under firm name and style of Spaulding, Miller & Co., Mo.; Wm. A. Pendleton, Ky.; Thos. G. Hanley, Va.; M. L. & Wm. Bowlin, partners under firm name of M. L. Bowlin & Co., Ind.; W. H. White, Ga.; J. B. Bagby, Chase City, Va.; F. G. Dolan & C. F. Miller, partners under firm — and style — Dolan & Miller, Brooklyn, N. Y.; Lizzie Schnitzen & J. Gay, partners under firm name and style of L. Schnitzen & Co., Mo., and their counsel of record, C. B. Thomas and G. J. Holbrook, of firm of Holbrook & Thomas; J. A. Walker & M. M. Caldwell, of firm of Walker & Caldwell; W. S. Poage, W. L. Stanley, R. Crockett, Sr., and R. Crockett, Jr., as Crockett & Crockett; A. A. Campbell, J. J. A. Powell, and W. B. Kegley; Peyton Gray, B. F. Buchanan, J. L. Kelly, Rockingham Paul, J. E. Moore, and C. B. Thomas and J. A. Walker, special prosecutors, and Robert Sayers, prosecuting attorney for Wythe county, Va.

And it is ordered that the service of copies of this decree upon the counsel aforesaid shall be equivalent to personal service upon said creditors, and that copies thereof be served upon the other defendants.

CHARLES H. SIMONTON,
Circuit Judge.

Aug. 5, 1896.

To the clerk of the circuit court of the United States, Abingdon.

The foregoing is a true copy from the order book of this court.

Witness my hand and the seal of the court this the 7th day of August, 1896.

[Seal United States Circuit Court, Western District of Virginia.]

I. C. FOWLER, *Clerk.*

56 *Petition for Appeal.*

Filed Octo. 8th, 1896.

In the Circuit Court of the United States for the Western District, at Abingdon.

Ex Parte: H. G. WADLEY.

Petition for writ of *habeas corpus;* petition for appeal.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and associate justices of the Supreme Court of the United States, at Washington, D. C.:

Your petitioner, I. R. Harkrader, who is the duly elected and legally qualified sheriff for the county of Wythe, in the Commonwealth of Virginia, and under the laws of said State keeper of the public jail in said county, respectfully represents to your honorable court that the said Commonwealth of Virginia, in the office
57 and person of your petitioner, has been grievously wronged by a certain order and decree made on the 14th day of August, 1896, by Judge Chas. H. Simonton in the matter of H. G. Wadley's petition for writ of *habeas corpus*, by which decree and order said Wadley, at that time, to wit, August 14th, 1896, and theretofore in the lawful custody of your petitioner as keeper of the public jail in the county of Wythe, was taken from and out of petitioner's control and custody; and from said order and decree petitioner prays an appeal to your high and honorable court for reasons set out and specified in his assignment of errors, which petitioner files herewith, and further prays that a transcript of the record and proceedings wherein said order and decree was made, prop-
58 erly authenticated, may be sent to your honorable court, at Washington, D. C.

I. R. HARKRADER,
Sheriff and Keeper of Wythe County Jail, Virginia.

R. TAYLOR SCOTT,
Attorney General of Virginia and Counsel for Petitioner.

Sept. 23, 1896.

The prayer of this petitioner allowed.

CHARLES H. SIMONTON,
Circuit Judge.

12 Octo., 1896.

Assignments of Errors.

Filed Octo. 8th, 1896.

59 First.

Because under the Constitution and laws of the United States the circuit court of the United States for the western district of

Virginia had not jurisdiction over the matter set out in the petition of H. G. Wadley for the writ of *habeas corpus*, and therefore the order and decree made by said court August 14th, 1896, is void.

Second.

Because in the prosecution for embezzlement pending in the county court of Wythe county, Virginia, styled "Commonwealth of Virginia *v.* H. G. Wadley," no Federal question was involved; therefore its order made August 10th, 1896, cannot be reviewed, amended, altered, or annulled by the United States circuit court for the western district of Virginia.

Third.

60 Because the order of the judge of Wythe county court entered on its record August 10th, 1896, was the proper exercise of the authority and jurisdiction conferred upon said court by the constitution and laws of the Commonwealth of Virginia, and if by that order H. G. Wadley was wronged he could then appeal to the circuit court of Wythe county and through that tribunal to the court of last resort in the Commonwealth of Virginia, the supreme court of appeals.

It is horn-book law that the writ of *habeas corpus* cannot be invoked when right of appeal is allowed.

Fourth.

Because H. G. Wadley when he presented his petition for injunction, which was granted by Judge Nathan Goff, was allowed
61 to make J. L. Gleaves, then attorney for the Commonwealth for the county of Wythe, a defendant, and to have process awarded against said State officer.

Fifth.

Because H. G. Wadley when he presented his petition for injunction, which was granted by Judge Charles H. Simonton, was allowed to make Robert Sayres, Jr., who succeeded J. L. Gleaves, and was then attorney for the Commonwealth for Wythe county, a defendant, and to have process awarded against said officer.

Wherefore the said petitioner, sheriff, &c., as aforesaid, prays that said order and decree be reversed, and that your honorable court enter a decree and order remanding H. G. Wadley to your petitioner's custody, to be dealt with according to the laws of the Commonwealth of Virginia.

62 R. TAYLOR SCOTT,
Attorney General of Virginia and Counsel for Petitioner.

Richmond, Va., Sept. 24th, 1895.

Bond. Filed Octo. 12, 1896.

63 & 64 Circuit Court of the United States of America, Western District of Virginia.

—— ——
vs.
—— ——.

Know all men by these presents that we, R. Taylor Scott, principal, and E. S. Turner, securities, are held and bound unto H. G. Wadley in the sum of two hundred and fifty dollars; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of October, A. D. 1896.

The condition of the above obligation is such that whereas a petition for *habeas corpus* has been instituted in the circuit court of the United States of America for the western district of Virginia, at Abingdon, Virginia, by H. G. Wadley, complainant, against I. R. Harkrader, sheriff and keeper of Wythe county jail, Va., defendant, and a decree having been entered against the said I. R. Harkrader, sheriff, &c., and the said I. R. Harkrader, sheriff, &c., having obtained an appeal and filed a copy thereof in the clerk's office of said court, at Abingdon, to reverse the said decree in said suit, and a citation directed to H. G. Wadley, citing and admonishing him to be and appear at the United States Supreme Court *of the U. S.*, to be holden at Washington, D. C., on the day in the said citation mentioned:

Now, therefore, if the complainant shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

R. TAYLOR SCOTT. [SEAL.]
E. S. TURNER. [SEAL.]

Sealed and delivered in the presence of—
JOHN R. TURNER.
H. D. TURNER.

Approved by—
CHARLES H. SIMONTON,
Circuit Judge.

65 *Order to Transmit Record.*

And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with

all things thereunto relating, be transmitted to the said Supreme Court of the United States, Washington, D. C.

And the same is transmitted accordingly.

[Seal United States Circuit Court, Western District of Virginia.]

I. C. FOWLER, *Clerk*,
Per STUART F. LINDSEY, *D. C.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
Western District of Virginia, in the Fourth Circuit.

66 I, I. C. Fowler, clerk of the circuit court of the United States for the western district of Virginia, in the fourth circuit, at Abingdon, do hereby certify that the foregoing is a true, full, and complete transcript of the record and proceedings had in said court, in the matter of H. G. Wadley's application for a writ of *habeas corpus*, directed to I. R. Harkrader, sheriff and keeper of Wythe county jail, Virginia, as the same remains of record and on file in said office, made for transmission to the Supreme Court of the United States, at Washington, D. C.

Witness my hand and seal of the said circuit court of the United States for the western district of Virginia, in the fourth circuit, at Abingdon, affixed hereunto this 20 day of October, A. D. 1896, and of our Independence of the said United States the 121st year.

[Seal United States Circuit Court, Western District of Virginia.]

I. C. FOWLER, *Clerk*,
P'r STUART F. LINDSEY, *D. C.*

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. G. Wadley, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 21st December, 1896, pursuant to an appeal from a decree of the circuit court of the United States for the western district of Virginia, in the fourth circuit, at Abingdon, in your favor, passed in a cause in said court wherein I. R. Harkrader, sheriff and keeper of Wythe county jail, Va., is respondent, &c., and you are petitioner *ex parte habeas corpus*, to show cause, if any there be, why the decree rendered, against the said I. R. Harkrader, sheriff, &c., in said cause mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court of the United States, this 23rd day of November, in the year of our Lord one thousand eight hundred and ninety-6.

CHARLES H. SIMONTON,
Circuit Judge.

68 On this 15th day of December, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared

—— —— before me, the subscriber, H. R. Levi, office deputy marshal, for G. W. Levi, U. S. marshal for the western district of Va., and makes oath the he delivered a true copy of the within citation to Jno. Blair, member of the firm of Blair & Blair, attorneys, at Wytheville, Va., who acknowledged himself as the attorneys for H. G. Wadley.

—— ——.

Sworn to and subscribed the 15th day of December, 1896.

WYATT M. ELLIOTT,
Clerk U. S. Courts at Lynchburg.

Executed Dec. 13th, 1896, by serving a true copy of the within on Jno. Blair, attorney for H. G. Wadley, in person.

H. R. LEVI,
Office Deputy Marshal.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to H. G. Wadley, Greeting:

You are hereby cited and admonished to be and appear at Supreme Court of the United States, to be holden at Washington, D. C., on the 21st December, 1896, pursuant to an appeal from a decree of the circuit court of the United States for the western district of Virginia, in the fourth circuit, at Abingdon, in your favor, passed in a cause in said court wherein I. R. Harkrader, sheriff and keeper of Wythe county jail, Va., is respondent, and you are petitioner *ex parte habeas corpus*, to show cause, if any there be, why the decree rendered against the said I. R. Harkrader, sheriff, &c., as in said cause mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court of the United States, this 23rd day of November, in the year of our Lord one thousand eight hundred and ninety-6.

CHARLES H. SIMONTON,
Circuit Judge.

70 [Endorsed:] #13, civil. Received Dec. 11th, 1896. Executed Dec. 11th, 1896, by reading the within to H. G. Wadley, at Wilmington, N. C. O. J. Carroll, United States marshal; T. O. Bunting, deputy marshal. Marshall's fee, $2.00.

Endorsed on cover: Case No. 16,457. Virginia, western district, C. C. U. S. Term No., 678. I. R. Harkrader, sheriff and keeper of Wythe county jail, Virginia, appellant, *vs.* H. G. Wadley. Filed December 26, 1896.

No. 280. 41.

Motion by Appt. to Advance.

Filed April 11, 1898.

IN THE

Supreme Court of the United States.

October Term, 1896.

No. 280.

I. R. HARKRADER, Sheriff and Keeper of Wythe County Jail, Virginia, Appellant,

vs.

H. G. WADLEY, Appellee.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Motion to advance by Appellant. To be submitted on Monday, April 11, 1898.

This case involves the right of a State to prosecute one accused of a crime committed within its jurisdiction and in violation alone of its laws.

The appellee was indicted May 16, 1894, in the County Court of Wythe county, Virginia, of a felony, in the embezzlement of property of the Wytheville Insurance and Banking

Company, a corporation created solely under the laws of Virginia.

In a creditors' suit instituted in the United States Circuit Court for the Western District of Virginia, to liquidate the indebtedness of said corporation, sundry injunctions were awarded, on and after June 8, 1894, to the appellee, upon his petition therein, restraining and enjoining the State of Virginia from the further prosecution of said criminal case. Subsequently the accused was released by *habeas corpus* proceedings instituted in said United States Circuit Court, thus absolutely barring the State from further prosecution.

The question, therefore, is of paramount interest, not only to this State, but to all the States of the Union. It is a question of first impression in the United States, and, so far as I have been able to ascertain, in the course of our system of jurisprudence. Whether the State can prosecute her own criminals in her own courts without injunctive interference and inhibition by the Federal Court is a matter, it is submitted, of such grave import as to merit as early a consideration as practicable by this Court.

This case has been pending in this Court since December 26, 1896, during all of which time the State's action has been withheld by the Federal proceedings complained of. An early hearing and adjudication of the matter involved is of great interest to and desired by the State.

Therefore, in view of the nature of the case and the importance necessarily attaching thereto, this motion to advance the hearing to a day as early as may be agreeable to this Court is earnestly asked and respectfully submitted.

A. J. MONTAGUE,

Attorney-General of Virginia

and *ex officio* Counsel for Appellant.

IN THE

Supreme Court of the United States.

No. 280.

I. R. HARKRADER, Sheriff and Keeper of Wythe County Jail, Virginia, Appellant,

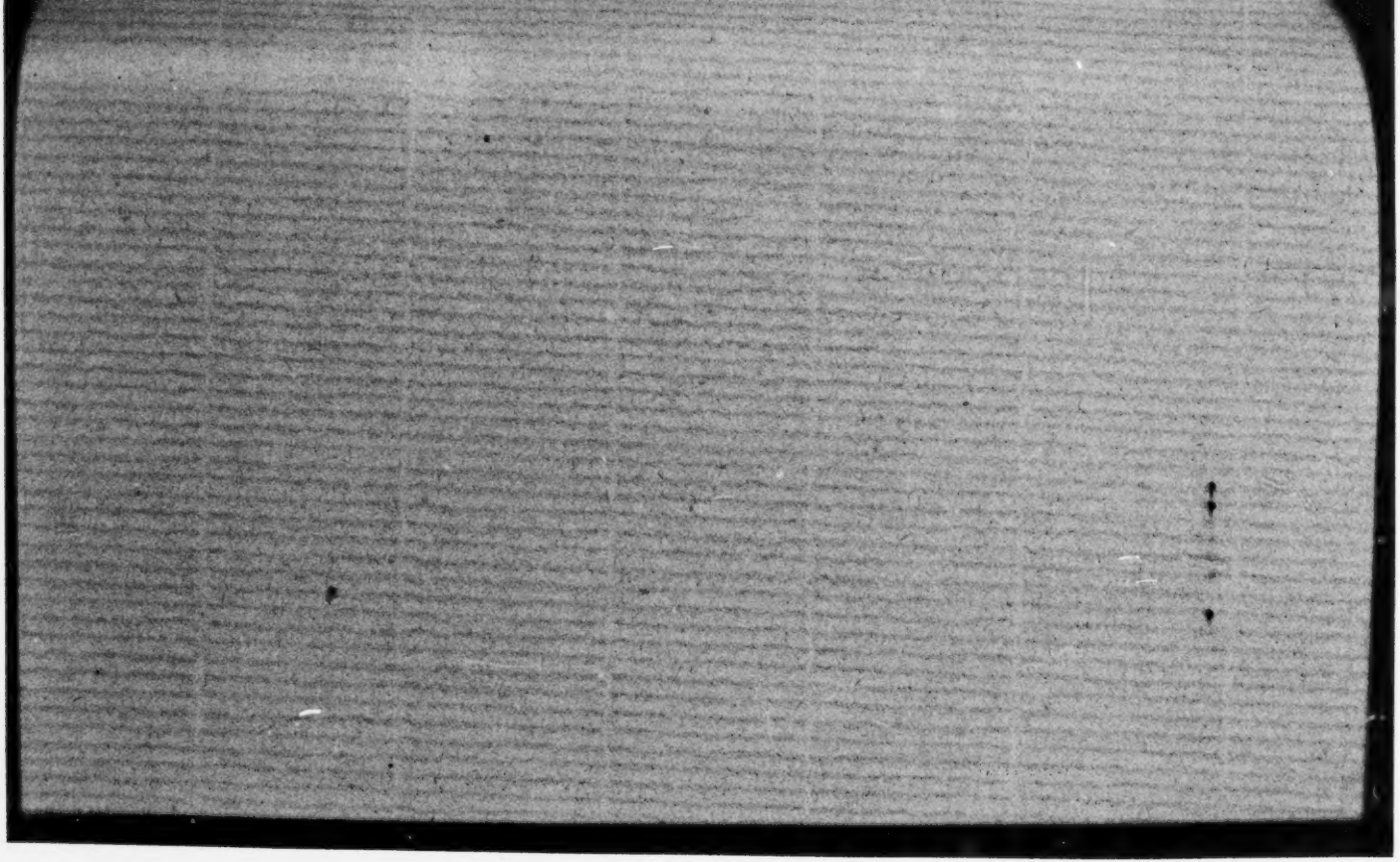
vs.

H. G. WADLEY, Appellee.

Brief for Appellant,

BY

A. J. MONTAGUE,
Attorney-General of Virginia
and *ex officio* Counsel for Appellant.



IN THE

Supreme Court of the United States.

No. 280.

I. R. HARKRADER, Sheriff and Keeper of Wythe County Jail, Virginia, Appellant,

vs.

H. G. WADLEY, Appellee.

BRIEF FOR APPELLANT.

Case Stated.

Appellee was indicted May 16, 1894, of a felony in the County Court of Wythe county, Virginia. The offense was the embezzlement of assets valued at over one hundred and ninety-six thousand dollars, of the Wytheville Insurance and Banking Company, a home corporation, having its chief office at Wytheville, in said county, and of which the appellee was president. The crime charged was wholly committed against the laws of Virginia and within the exclusive jurisdiction of her courts.

In equity proceedings, instituted in the United States Cir-

cuit Court for the Western District of Virginia, by the creditors of said corporation to procure the liquidation of its indebtedness, certain injunctions were awarded the appellee, upon his petition therein, prohibiting the Commonwealth's Attorney for said Wythe county and others from further prosecuting said indictment and exacting bail of the appellee. But neither the County Court of Wythe nor the judge thereof having been specifically included in the terms of the injunctive orders, bail was subsequently exacted by the said court "of its own motion."

Thereafter the appellee, in default of bail in the sum of ten thousand dollars, was committed, and to secure his release he petitioned the said United States Circuit Court for the writ of *habeas corpus*. Upon consideration thereof that Court, *in term*, discharged him from the custody and control of the State Court, and from this judgment this appeal was perfected by the Commonwealth of Virginia through her former Attorney-General.

Argument.

The record exhibits the following facts:

(1) That the appellee was indicted in a State court for a State offense; (2) that the State statute defining and creating the offense charged was in no wise repugnant to the Constitution of the United States; (3) that the indictment legally and sufficiently sets forth the crime charged; (4) that the said offense could only have been indicted in the County Court of Wythe, as this Court had exclusive jurisdiction thereof; (5) that the crime charged could not be tried in any court of the United States; (6) that the accused was held in custody of the State court in pursuance of due process of law; and (7) that the United States Circuit Court intervened, first, to prohibit by injunction, the prosecution of said offense, and subsequently, by *habeas corpus* to release the accused from the commitment incident to his failure to give most reasonable bail.

I.

It is submitted that this exercise of judicial power by the United States Court in thus releasing the accused, is wholly without authority and *coram non judice*; and the only question of the slightest difficulty, is whether the record is so technically arranged as to afford this court jurisdiction for appellate review.

It may be contended that the appeal does not lie to this court for the reason that no formal certificate of the question of jurisdiction is made by the trial court, as required by section 5, of Act of March 3, 1891. This contention cannot be soundly maintained unless this court is asked to put vital stress upon the mere mechanical form of the certificate itself.

The most cursory reading of the record shows but one question, and that is the *jurisdictional power* of this Federal court, as derived from the Constitution of the United States, to thus interfere with the State in the prosecution of crimes against her laws and in her own courts. This jurisdictional question affimatively appears upon almost every page of the record.

The petition for the writ of *habeas corpus* avers as the first and chief ground of the unlawful imprisonment of the appellee that the United States Circuit Court had "prior jurisdiction * * * both of the person of your petitioner and also of the subject matter of the controversy and of the issues involved in said indictment, and that said prior jurisdiction of the said United States Court renders such detention and imprisonment of prisoner by said County Court illegal." *R.*, 3, 4.

The return of the sheriff to the writ avers the jurisdiction and lawful proceedings of the County Court as his warrant for the custody and detention of the prisoner (*R.*, 6). And the answer and denial of the appellee to said return substantially asserts the jurisdiction of the United States Court. *R.*, 10.

The petition for appeal is grounded solely upon the the question of jurisdiction. It is true that numerically there are several assignments of error in said petition, yet these several

assignments of error all present this one question of jurisdiction, and the absence of any constitutional warrant for such jurisdiction.

These assignments reveal nothing but varying statements of the one question at issue—jurisdiction. Moreover, these assignments are made a part of the petition for appeal, and upon this petition the trial judge granted the appeal, and the record certified is pertinent to this question of jurisdiction and only covers this question.

It is submitted, therefore, that the jurisdictional question is so certified in this record as to comply with the rulings in

Shields v. *Coleman*, 157 U. S., 168;
Interior Con. & Imp. Co. v. *Gibney*, 160 U. S., 217;
Re Lehigh M. & M. Co., 156 U. S., 327;
Smith v. *McKay*, 151 U. S., 355.

II.

Assuming, now, that this cause is appealed to the proper tribunal, I will pass to the consideration of the jurisdiction of the trial court.

1. Had the accused been indicted in the Federal, instead of the State court, for an offense against the United States, and had he been committed upon failure to give reasonable bail, would *habeas corpus* lie to procure his release? Certainly not, for said imprisonment is in no sense unlawful.

The jurisdiction of this court to review judgments of inferior United States Courts in criminal cases by writ of *habeas corpus* is limited to the single question of the power of the lower court to commit the prisoner for the act of which he is charged.

Ex parte Carll, 106 U. S., 521;
Ex parte Siebold, 100 Ib., 371;
Ex parte Belt, 151 Ib., 94.

> "The only question that can properly be raised upon this writ, is whether the [United States] Circuit Court exceeded its jurisdiction in holding the petitioner for a contempt and imposing upon him a fine therefor. * * * It is only upon the theory that the proceedings and judgment of the court were nullities that we are authorized to reverse its action. It has been too frequently decided to be now an open question that the writ of *habeas corpus* cannot be made use of to perform the functions of a writ of error or of an appeal."

Ex parte Lennon, 166 U. S., 548, 553.

2. If such be the rulings on a review of the action of a Federal Court, *a fortiori* must they apply when the action of a State Court is sought to be reviewed by the Federal Court upon *habeas corpus* proceedings.

> "Where the State Court had jurisdiction of the offense and of the accused, and proceeded under a statute not repugnant to the United States Constitution, a United States Circuit Court has no authority to interfere with the execution of the sentence by writ of *habeas corpus*."

Bargemann v. *Backer*, 157 U. S., 655;
McElvaine v. *Brush*, 142 Ib., 155.

The United States Courts have no authority to issue *habeas corpus* to take one properly in custody under State authority from such custody. Nor has State Court authority to remove a defendant from custody of authorities of the United States.

U. S. v. *Rector*, 5 McLean, 174;
Ableman v. *Booth*, 21 How., 506;
Ex parte Dorr, 3 Ib., 103;
Wood v. *Brush*, 140 U. S., 278.

> Nor can the regularity of the proceedings of the State Court nor the validity of its sentence be called in question by a United States Court by *habeas corpus* or any other process.
>
> *Ableman* v. *Booth*, supra.

It would seem, in view of the repeated decisions of this court, that the doctrine established by these citations is no longer an open question; and that as an inexorable consequence the issuance of this writ by the United States Circuit Court to release this appellee from the prosecution of a State crime, committed by a person and at a place confessedly subject to her jurisdiction, is the exercise of power plainly and palpably beyond the jurisdiction of that court. The offense charged is against the authority and laws of Virginia. She alone has the right to inquire into its commission and punish the offender. The statute of Virginia creating and defining embezzlement is, therefore, in no possible sense repugnant to the United States Constitution, and this prosecution is as much beyond the jurisdiction of the United States Court "as if the offense had been committed on another continent."

III.

1. But this remarkable procedure seemed to be the culmination of a prior judicial act equally anomalous. The consideration of this court is, therefore, invited to this initial step.

Hutchinson's administrator, a citizen of Iowa, instituted on October 5, 1893, a suit in the said United States Circuit Court, against the said Wytheville Insurance and Banking Company. The bill alleged insolvency, and prayed for the appointment of a receiver and the general liquidation of the indebtedness of the defendant. Thus far the appellee had not been indicted. He was, however, indicted of the felony in question on May 16, 1894. On the next day the accused was bailed in the sum of ten thousand dollars. On June 8, 1894, the appellee obtained from United States Circuit Judge Goff

an injunction restraining the Commonwealth's Attorney and others from further prosecution. This injunctive inhibition was, on January 31, 1895, and August 6, 1896, respectively, so enlarged as to bar any further steps in the prosecution save that of exacting bail, which the County Court, "of its own motion," required, in the exercise of the only remnant of power left to the Commonwealth.

This bail seems to have been given from time to time until August, 1896, when the appellee declined further to tender bail, and, upon his commitment, set on foot the *habeas corpus* proceedings in question.

In the petition for *habeas corpus* the petitioner signed two causes of illegal detention: (1) That the injunctive decrees of January and August declared and adjudicated "the prior jurisdiction of the United States Court, both of the person of your petitioner and also the subject-matter of the controversy and of the issues involved in said indictment"; and (2) that the said indictment had been improperly found by reason of the admission before the grand jury of illegal evidence.

(*a.*) It is needless to elaborate the second cause, for it is too well settled now to admit of doubt that *habeas corpus* will not lie to correct such an error connected with the finding of the bill by the grand jury.

Ex parte Harding, 120 U. S., 782;
Ex parte Wilson, 140 U. S., 575.

(*b.*) It is, however, really the former ground which is the basis of the court's action in awarding this writ, and consideration of this is now asked.

It should be observed that though this indictment was found in the State Court a month prior to the issuance of the first injunction, yet the United States Court decrees that it first had jurisdiction of the "person" of the accused, and of the "issues involved in the indictment."

The prior jurisdiction of the "person" was claimed as a corollary of the jurisdiction to entertain the creditors' suit to

wind up the affairs of the insolvent insurance and banking company, of which the appellee was president, but to which suit, at the time of the indictment, he was not a party. In other words, the United States Court held that when it acquired jurisdiction to liquidate the indebtedness of an insolvent State corporation, no officer thereof could be prosecuted in a State Court, without the permission of the Federal Court, for embezzling the assets of the corporation, until the civil suit in the United States Court is completed and dismissed from its docket. And it is likewise claimed that jurisdiction of the "issues involved in the indictment" rested upon similar deductions.

This action of the court seemed to be based upon the general proposition that the court first obtaining jurisdiction of the subject matter and the parties, has exclusive control of both until a final disposition has been made of the "questions submitted."

This general proposition, however, finds no application here, for the United States Court did not first obtain jurisdiction even of the parties, in that the appellee was indicted in the County Court on May 16, 1894, and was not made a party to the civil suit in the United States Court until May 26, 1894. Besides, neither the Commonwealth of Virginia nor Wadley, the appellee, parties to the criminal case in the County Court, submitted, or could submit, the criminal subject matter therein involved to the United States Court.

Nor is it maintainable that a court having civil jurisdiction over the person and property of the litigant can thereby exercise jurisdiction over the crimes committed by him in his dealings with the property before the acquirement of such civil jurisdiction. Therefore, the several injunctions inhibiting the criminal prosecution are beyond the jurisdictional power of the court.

It is well settled by the weight of reason and authority that an injunction will not lie to restrain criminal proceedings. In *ex parte Sawyer*, 124 U. S., 200, Mr. Justice Gray, with his

accustomed learning, research and discrimination, delivered so comprehensive an opinion upon this proposition as to render further discussion unnecessary. He says that:

1. "Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the countries, has been maintained, although both jurisdictions are vested in the same courts."

2. "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the Executive and Administrative Department of the Government."

3. "From long before the Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process."

4. "The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right."

5. "And in American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the State, or under municipal ordinances."

In re Sawyer, supra;
Suess v. *Noble*, 31 Fed. Rep., 885;
Helmsburg v. *Meyers*, 45 Ib., 283;
Davis v. *American Society*, 75 N. Y., 326.

It is, moreover, with confidence submitted that the cases of *Mayor of York* v. *Pilkinton*, 2 Adkins, 302; *Lord Montague* v. *Dudman*, 2 Vesey, 396; and *Attorney General* v. *Cleaver*, 18 Ib., 220, cited by the learned judge in his opinion, do not at all sustain the right of the lower court to issue these injunctions. In the first case mentioned, Lord Hardwicke tersely said that "This Court has not strictly and originally any restraining power over criminal prosecutions." And again, in 2 Vesey, *supra*, he said: "This Court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*; nor to an indictment; nor to an information; nor to a writ of prohibition that I know of." A comparison, too, of the first case and this case, evolves the distinction that separates them as far apart as the poles. In *Mayor of York* v. *Pilkinton*, the plaintiff and defendant both claimed the right of fishery in the river Ouse, and bills and cross-bills were brought to establish their several rights. Before the disposition of these equity proceedings, however, the plaintiff indicted the defendant for a breach of the peace. The indictment alleged merely fishing in said river, *without any actual breach of the peace*, which the Mayor of York claimed was a trespass. Here, then, there was not even a constructive breach of the peace if the defendant had the right of fishery, which right was to be determined in the equity proceedings. That is to say, the *same right* was being litigated in both forums at the same time. I beg to accentuate the fact that the Chancellor states that there was "no actual breach of the peace." The suggestion, therefore, is that if there had been an actual breach of the peace or a public crime committed, there would have been no restraining order.

In the case in 2 Vesey, a *mandamus* was sued out to compel Lord Montague to hold a court and admit defendants as ten-

ants. The bill of his Lordship prayed for an injunction to stay the proceedings on a *mandamus*. A demurrer to this bill was sustained by Lord Hardwicke. The Chancellor asked: "How can I grant an injunction to a writ of *mandamus* at common law?" His ruling for the plaintiff in *Mayor of York* v. *Pilkington*, *supra*, was cited as authority. But his Lordship replied: "This court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*; nor to an indictment, nor to an information. As to *Mayor of York* v. *Pilkinton*, the court granted an order to stay proceedings because the question of right was depending in the court, in order to determine the right, and therefore it was reasonable they should not proceed by action or indictment until it was determined. Here, as there, it came in incidentally."

In the remaining case of *Attorney General* v. *Clearer*, *supra*, an information was filed to restrain the defendants from operating a soap factory. An indictment had also been found against the defendant, but the injunction was refused.

2. From these citations it is apparent that no Federal court under the circumstances found in this record has jurisdiction to grant an injunction to any other Federal court restraining the prosecution of a crime; and *a fortiori* is such power wanting in the Federal court to restrain a State from the prosecution of crimes against her own laws.

The judicial power granted by the Constitution does not cover this case or controversy. The Constitution creating this government of limited powers bounded those powers, and beyond those bounds it is not lawful to pass. I commend to this court the language of Mr Justice Field in his concurring opinion in *Virginia* v. *Rives*, 100 U. S., 324, 336. He holds that the judicial power under the Constitution

> "does not include in its enumeration controversies between a State and its own citizens. There can be no ground, therefore, for the assumption by a Federal court of jurisdiction of offenses against the laws of a State. The judicial power granted by the Constitution does not cover any such case or controversy."

> He further says: "The second objection of the Commonwealth to the legality of the removal is equally conclusive. The prosecution is for the crime of murder, committed within her limits, by persons and at a place subject to her jurisdiction. The offense charged is against her authority and laws, and she alone has the right to inquire into its commission, and to punish the offender. Murder is not an offense against the United States, except when committed on an American vessel on the high seas, or in some port or haven without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. The offense within the limits of a State, except where jurisdiction has been ceded to the United States, is as much beyond the jurisdiction of these courts as though it had been committed on another continent. The prosecution of the offense in such a case does not, therefore, arise under the Constitution and the laws of the United States; and the act of Congress which attempts to give the Federal courts jurisdiction of it is, to my mind, a clear infraction of the Constitution. That instrument defines and limits the judicial power of the United States."

Virginia v. *Rives*, *supra*, 336.

Indeed, unless this reasoning be sound and the adjudication authoritative, our dual scheme of government is at an end, and the power of a State to enforce police regulations and to suppress crime is likewise at an end.

> The general government and the States, although both exist within the same jurisdictional limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres.

Collector v. *Day*, 11 Wal., 113.

3. And in order that this essential construction of our sys-

tem of government should be free from the changing judgments of man, the statute of March 2, 1793, was enacted.

> "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Sec. 720, U. S. R. S.

It is an interesting historic fact that this legislative limitation of March, 1793, was passed at the same session of Congress that the Eleventh Amendment was proposed, and that both were intended to secure to the States unquestioned exemption from Federal interference. The exception respecting bankruptcy was afterwards made.

This statute has been construed in a long line of decisions, and no where has it found the interpretation placed upon it by the trial Judge.

> "Section seven hundred and twenty means that the United States Court shall not in any manner stay proceedings in a State Court. The term proceedings includes all steps taken by a State Court, under its process from beginning to end, until final process of execution."

United States v. *Collier*, 6 Blatch., 362.

The trial Judge, however, endeavors to remove the application of the above section by invoking section 716, U. S. R. S., as giving power to the United States Court to issue all orders necessary to the exercise of its jurisdiction. He cites numerous authorities to sustain this view, as appears from his opinion. *R.* 40. The learned Judge, however, begs the whole question, for the contention is not that the court did not have the right to issue all orders essential to the exercise of its jurisdictional power, but that there is no authority to issue orders for the exercise of a power clearly beyond its jurisdiction.

It is needless to review the authorities of the learned Judge respecting the construction of section 716. These are all covered by the general statement that an examination of them will disclose that the injunctions therein were granted to parties who were endeavoring to enforce in the State Courts judgments or decrees theretofore declared void by the United States Court; and the injunctions were, therefore, manifestly ancillary proceedings in maintainence of original Federal authority.

The following quotation from the case of *Deitzch* v. *Huidekoper*, 103 U. S., 494, cited by the eminent Judge, is clearly against his construction and in favor of the contention here made:

> "The suit upon the bond was therefore but an attempt to enforce a pretended judgment of the State Court rendered in a cause over which it had no jurisdiction, but which had been transferred to and decided by the United States Circuit Court. The bill in this case was therefore ancillary to the replevin suit and was in substance a proceeding in the Federal Court to enforce its own judgment. A court of the United States is not prevented from enforcing its own judgment by the statute which forbids it to grant an injunction to stay proceedings in a State Court."

So that these injunctions here complained of are not only against the law of the land as settled by the weight and reason of authority, but against the explicit inhibition of the statute itself, and they are, therefore, upon every consideration of authority, statute and constitutional limitation, beyond the jurisdictional power of the Federal Court.

It is also apparent that the *habeas corpus* rested upon, and found its alleged warrant in, the injunctive decrees. Indeed, the *habeas corpus* was ancilliary to the injunctions, and gave to them their destructive vitality. But the *habeas corpus* itself is without jurisdiction, and the injunction is equally without jurisdiction; so we have a nullity avouched to sustain a nullity—a non-jurisdictional act grounded upon a prior non-jurisdictional and unconstitutional act.

4. Nor can it be contended that the scope of this writ is too narrow to inquire into the jurisdictional power of the court in granting the injunctions.

> *Habeas corpus* has been issued by the Supreme Court to inquire into the validity of an order of a Circuit Court of the United States, committing a party for refusing to answer interrogatories, which it was alleged were propounded to him in violation of the Federal Constitution.
>
> *Ex parte Fisk*, 113 U. S., 713.
>
> Also to inquire into the validity of an order of a Circuit Court in *mandamus* proceedings for refusing to obey which the party was committed for contempt, it being alleged that the order of commitment exceeded the jurisdiction of the court.
>
> *Ex parte Howland*, 104 U. S., 604.
>
> And to inquire into the validity of an injunction or restraining order, issued by a Circuit Court to prevent the eviction of an office holder, the defendants having disobeyed the order and been imprisoned therefor.
>
> *Ex parte Sawyer*, *supra*, 200.
>
> And to inquire into the validity of injunctions, issued by the United States Circuit Court, restraining the Attorney-General of Virginia and the Commonwealth's Attorneys of her several counties from instituting certain suits respecting the collection of the State revenue, the defendants having disobeyed the injunctions and been imprisoned therefor.
>
> *Ex parte Ayers*, 123 U. S., 443.

This authority perfectly sustains the compass of this writ of *habeas corpus* to inquire into the constitutional validity of the restraining order involved in this appeal. And it is worthy of

notice that in *ex parte Ayers*, *supra*, the writ was allowed to inquire into the validity of decrees enjoining the Attorney-General and Commonwealth's Attorneys from instituting suits for recovery of taxes, upon the ground that the State statute authorizing said suits was repugnant to the Federal Constitution. Here, however, there is no pretense that the statute covering the indictment against Wadley was at all repugnant to the Constitution.

Therefore, it is submitted that the writ, both in practice and upon authority, is copious in its scope to present upon this appeal the validity of these injunctions.

IV.

My contention heretofore has been that the first assignment of error, together with the petition, the order allowing the appeal and the pleadings, make the record affirmatively show that the question of jurisdiction was sufficiently certified to meet the requirements of the Evarts Act; and that the remaining four assignments of error are really a part and explanitory of the first.

These four latter assignments substantially explain the question of jurisdiction specifically contained in the first assignment, in this, that the question of jurisdiction was that the court had no *constitutional* authority for the exercise of the power complained of. Therefore, if this court be of the opinion that the question of jurisdiction is insufficiently certified, or that the four last assignments of error can not be treated as a part of the first, then the said four assignments *ex necessitate* present a "case which involves the construction or application of the Constitution of the United States."

The constitutional question is this, that the injunctions against the two several Commonwealth's Attorneys of Wythe county and the judge thereof (they being the only authorities competent to conduct this prosecution for the State) restraining them, and thereby the State, in the prosecution of this

felony, is really a suit against the State itself, in contravention of the eleventh amendment of the Constitution of the United States.

The early expression of this court that the State is not a defendant unless a *party to the record*, has long since been modified, and it is now the settled law of this court that "whether a State is the actual party defendant in a suit within the meaning of the 11th amendment of the Constitution of the United States, is to be determined by a consideration of the nature of the case as presented by the whole record, and not in any case by a reference to the nominal party on the record. That amendment must be held to cover not only States by name, but those against its officers, agents and representatives, while the State, though not named, is the real party against which the relief is asked and the judgment will operate."

In re Ayers, 123 U. S., 443.

In *In re Ayers* the Attorney General and Commonwealth's Attorneys were enjoined from instituting certain suits for the recovery of taxes due the State. The grounds of the bill were that the statutes, under which said suit was brought, were repugnant to the Constitution of the United States, and therefore the suit seeking to restrain said officers was not against the State, but against the officers themselves. These officers, upon refusing to obey the injunctions, were committed for contempt therefor. The court there held that, though the statutes were unconstitutional, the act of the State's officers was the act of the State, and a suit against them was in violation of the eleventh amendment.

If this be not a suit against the State, against whom is it? Have the Commonwealth's Attorneys and County Judge any personal interest whatever in the litigation? Are they not purely the representatives of the State? And is there any way known to the wit of man by which the State could be enjoined in this prosecution other than by restraining these very officers themselves?

"How else can the State be forbidden by judicial process to bring actions in its name except by constraining the conduct of its officers, its attorneys and its agents? And if such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?

"It is, therefore, within the prohibition of the 11th Amendment to the Constitution. By the terms of that provision it is a case to which the judicial power of the United States does not extend. The Circuit Court was without jurisdiction to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring suits, for bringing which they were adjudged in contempt of its authority, it had no power to make. The orders adjudging them in contempt were equally void, and their imprisonment was without authority of law. It is, therefore, ordered that the petitioners be discharged."

In Re Ayers, supra.

Mr. Justice Matthews, in this case, so thoroughly discusses the whole question as to render other citations useless.

It is proper to accentuate again that in the case last cited the court decided it was without jurisdiction, because the exercise of jurisdiction complained of was within the inhibition of the Eleventh Amendment. Therefore, in the case at bar the action of the court is void for the same reason. The Circuit Court was without jurisdiction, because the Eleventh Amendment forbade its doing what it did do. There could be, in this case, no jurisdictional question without the constitutional question; and there could be no constitutional question without the jurisdictional question; for they are so interwoven as to be inseparable. Therefore, the constitutional question involves the

jurisdictional question. In the case of *McComb* v. *Board of Liquidation*, 92 U. S., 531, this court distinctly considered the jurisdictional question involved as arising from the fact that the suit was against State officers.

The State of Virginia, aggrieved at this violation of her rights and this obstruction of the administration of her laws, appeals to this court for remedial justice.

A. J. MONTAGUE,
Attorney-General of Virginia
and *ex officio* Counsel for Appellant.

No. 41.
Reply Brief of Montague for Appellant
Filed Oct. 1, 1898.

IN THE

Supreme Court of the United States.

No. 41.

I. R. HARKRADER, Sheriff and Keeper of Wythe county Jail, Virginia, Appellant,

v.

H. G. WADLEY, Appellee.

REPLY BRIEF FOR APPELLANT.

A. J. MONTAGUE,
Attorney-General of Virginia,
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IN THE

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No. 41.

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REPLY BRIEF FOR APPELLANT.

First.

The brief of the appellee contends that this is not an appeal from the judgment of the Circuit Court, but that it is an appeal from the judgment of the Circuit Judge, sitting at chambers.

In the latter case it is conceded that no appeal lies. But such is not the fact in the case at Bar. Here the original order was made at chambers, but that same order was subsequently made and entered in the Circuit Court of the United States, in term (R., 12), and is, therefore, within the very rulings of the cases cited in the brief of appellee. In *In re Palliser*, 136 U. S., 262, the *habeas corpus* proceedings were disposed of by the judge at chambers, yet this order was sub-

sequently made the order of the United States Circuit Court, and it was from the latter order that the appeal was properly perfected. *McKnight* v. *James*, 155 U. S., 685, cannot be cited as a very pertinent authority. The appeal was defective in that case for two reasons: First, that it was from an order of the State Circuit Judge at chambers; and Second, that the appeal was not from the highest Court of the State. However, Mr. Justice Brown, after observing the method of treatment of the jurisdiction of the State Court by the brief of the plaintiff in error, in which it was maintained that the Circuit Court was the highest court of the State, *quoad* that case, uses this suggestive language, which completely sustains the appeal in the case at Bar:

> "In this view, petitioner should at least have applied to that court for a writ of error, or had the order of the Circuit judge at chambers made the order of the Circuit court."

Thus, in the case at Bar, the order of the Circuit Judge at chambers was made the order of the Circuit Court, and therefore the action, as shown by the record, is completely within the rulings and suggestions of Mr. Justice Brown as above quoted.

SECOND.

The further contention of the appellee is that the judgment was not final, and hence not appealable.

The cases of *Carter* v. *Fitzgerald* and *McLish* v. *Roff*, cited by appellee, are not of sufficient pertinence to be of weight. In the first place the appellee was not discharged "pending said injunction." This might or might not have been the purpose of the Court. The order simply recites that he was discharged "from the custody of said court, as said court cannot prosecute said indictment pending said injunction." (R., 12.) There is no restriction in the order that when the injunction has been disposed of the United States Court would return the prisoner, the appellee, to the State of Virginia. But conceding that the United States Court intends to return the prisoner

to the State Court for prosecution at some future day, yet it is submitted that such action on the part of the Federal Court is final in its character. Is not the taking away from the State the right to exact bail of its own criminals, and the right, therefore, to administer its own justice and its own criminal proceedings, an act so final in its character as to warrant the interposition of this Court for a review of such proceedings? The instant the right to exact bail, or to prevent further prosecution of the accused is taken away, then such a final act has occurred as to justify this appeal. The order prohibiting the State Court to exact bail is substantive, definitive and complete in itself. It is sufficient in itself to destroy the State's authority and to prevent the proper administration of her criminal laws. It is the stopping of the State Court in the progress of its proceedings, rather than the obstructing them for any length of time, that is the question involved. It adjudicates a right of the most paramount character, vital to the very existence of the State itself, and therefore the adjudication is so final in its character as to warrant the fullest intervention of this Court to review these proceedings.

THIRD.

In the former brief of the appellant, on page 3, the Court will find a discussion of the failure of the record to contain the formal certificate of the question of jurisdiction; and it cannot now be perceived that the argument there advanced as to the immateriality of the absence of a mere mechanical certificate needs further elaboration.

The contention of the appellee must fall unless, as has been before observed, this court should "put vital stress upon the mere mechanical form of the certificate itself," for the pleadings unmistakably show that this question alone is presented, and affirmatively presented.

One of the elementary and essential averments in the petition for a writ of *habeas corpus* is that the court or judge has jurisdiction to grant the writ. Indeed, the chief function of the writ of *habeas corpus* appertains to jurisdictional questions.

> "The only ground upon which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or cause, or some other matter rendering its proceedings void."
>
> *Ex parte Siebold*, 100 U. S., 732.
> *Ex parte Lennon*, 166 U. S., 553.

Thus the very nature of the proceedings present the one question of jurisdiction, and therefore, under the rulings of this court, the certificate itself is not essential, and this case is properly in this court upon appeal.

In the case of *Van Wagenen* v. *Sewell*, cited in appellee's brief, the court held that if it clearly appeared in the decree of the court below that no other question than that of jurisdiction was involved, the certificate was not necessary. But in that case the question of jurisdiction could only be found, if found at all, in a general demurrer to the bill for want of equity, and manifestly the demurrer could not properly raise the question of jurisdiction.

Nor does the case of *Chappell* v. *United States*, cited by the appellee, present any controlling analogies either of fact or pleading, to the case at Bar. In that case the question of jurisdiction was vaguely presented "among many other defenses," and the jurisdictional question was neither alone involved nor made to appear in any affirmative manner in the pleadings or judgment of the Court. Therefore, the Court clearly differentiated that case from the rulings of *Re Lehigh M. & M. Co.*, *Interior Const. & I. Co.* v. *Gibney*, and the like class of cases, the principles of which differentiation are relied upon here as bringing this case clearly within the scope of appellate review.

And likewise the case of *Davis* v. *Geissler*, cited by the appelee, is of no direct bearing. In that case not all of the defendants appeared, "but the defendants in error did, and pleaded a modified general denial, and twelve other defenses,

setting up fraud in respect of the contract, non-performance, want of jurisdiction in that one of the defendants, B. Mohanna, was a co-citizen of Illinois with plaintiffs, and that Mohanna's subscription to the contract was really a subscription by plaintiffs, made by him as their agent." From this copious category of defenses it would be difficult indeed to find the question of jurisdiction alone involved in the absence of any certificate covering the precise question. But how different is the case at Bar, for—

> "The only question that can properly be raised upon this writ, is whether the Circuit Court exceeded its jurisdiction in holding the petitioner for a contempt and imposing upon him a fine therefor."
>
> *Ex parte Lennon, supra*, 553.

In this portion of appellee's brief, as a further contention that the assignment of errors cannot import into a cause questions of jurisdiction which are not found presented by the record, are cited as authority therefor: *The Bayonne*, *Ansbro* v. *United States*, and *Cornell* v. *Green* (Brief, p. 7). Of course this contention is sound, but are these really pertinent precedents here? In *The Bayonne* and *Ansbro* v. *United States*, both cases related to the violation of an act of Congress prohibiting the placing or depositing of refuse matter into the tidal waters of the harbor of New York, and imposing a fine or imprisonment therefor. In the former case *in rem* proceedings were instituted against a ship for depositing ashes in the prohibited waters, the said proceedings being intended to secure the payment of the fine. In the latter case Ansbro was indicted for dumping injurious deposits within the forbidden limits. No question of jurisdiction was raised during the progress of the trials or otherwise presented, save in the latter case a certificate of jurisdiction was made at a subsequent term of the Court, and an effort was made to have the same treated *nunc pro tunc*.

In *Cornell* v. *Green* the Court held that no constitutional

question at all was presented to the trial Court, therefore no assignment of error could cover the question in the appellate court.

But in the case at Bar the facts are entirely different, for it is submitted the record shows that the trial Court had of necessity to pass upon the very question presented in the assignment of errors; and that this assignment of errors did not originate the questions of error, but was really a statement of such questions of error as were contained in the record and passed upon by the trial Court.

Fourth.

The fourth contention of the appellee is that upon an appeal from a judgment on the *habeas corpus* proceeding, no question of the jurisdiction of the Court to enjoin a criminal prosecution in the State Court can be raised.

Reference is made to the appellant's original brief on page 4, as containing a complete answer to this contention. But admitting, for the sake of argument merely, the position of the appellee that the *habeas corpus* proceeding is a collateral attack of the injunctive decree, yet how can the judgment, alone and disconnected with the injunction proceedings, releasing the prisoner from imprisonment and from bail by means of this writ, fail to be reviewed in this Court? Take this naked judicial act, and does it not present a jurisdictional and constitutional question of the gravest moment? It was surely illegal to have awarded the injunction in question; but what of the further act withholding the State from even exacting bail or any security for the presence or return of the prisoner to its jurisdiction? Mark the argument of the appellee that this injunction is only temporary; yet the very action of the State Court to secure the presence of the prisoner when this "temporary injunction" has run its uncertain course is denied to the State by the Federal Court.

FIFTH.

The fifth ground of the appellee as to why this Court should not assume jurisdiction of this appeal, is that the record does not show that the appeal "allowed was ever filed in the United States Circuit Court."

The record itself is avouched to show the incorrectness of this contention and that the law applicable has been complied with in every respect.

A. J. MONTAGUE,

Attorney-General of Virginia,
and ex-officio Counsel for Appellant.

No. 280. 41.

Brief of Blair for Appellee

Filed April 11, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. [redacted]. 280

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VA., APPELLANT,

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief of F. S. Blair, Counsel for Appellee.

S. A. ST. CLAIR PRESS, WYTHEVILLE, VA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 678.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VA., APPELLANT,

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief of F. S. Blair, Counsel for Appellee.

Statement of Facts.

This is an Appeal, by Harkrader Sheriff of Wythe County, Virginia, from an order of Hon. Charles H. Simonton, Judge of the Circuit Court of the United States for the Fourth Circuit, discharging H. G. Wadley, on a writ of Habeas Corpus, from the custody of said sheriff who held him a prisoner on an order of commitment of the County Court of Wythe County, Virginia.

On the 11th August, 1896, the said Wadley presented to Hon. Charles H. Simonton, *as Circuit Judge*, in vacation, a petition for a Writ of Habeas Corpus. This petition, duly verified, represented that said Wadley was unlawfully imprisoned in the County jail of Wythe County, Virginia, in the custody of said Harkrader, by virtue of an order of Commitment of the said County Court of Wythe County, Virginia, at Wytheville, made on the 10th August, 1896. The petition with its exhibits further represented that certain creditors of the Wytheville Insurance and Banking Company, had, in October,

1893, brought, in the Circuit Court of the United States for the Western District of Virginia at Abingdon, two equity Suits under the style of Paul Hutchinson *vs.* The Wytheville Insurance and Banking Company, and Blount & Boynton et al *vs.* H. G. Wadley et al, in which suits a Receiver was appointed who took charge of all of the assets of said Company, and in which there was a restraining order, and that a Master Commissioner of said Federal Court had been appointed to take all necessary accounts of the indebtedness of said Company, and of said Wadley's liability to said Company upon a charge made in the bills of a misappropriation and conversion of the assets of the Company by said Wadley, who was its President, and of a consequent claim of liability by Wadley to said creditors of said Company; that said Master had proceeded with his accounts, and had, in the progress of the account, taken the deposition of Wadley himself, and had said deposition, and the books and records of said Company under his control as such Master of the Federal Court in said equity suits. The petition further represented that on the 16th April, 1894, while said suits were still progressing, and while said Federal Court had *a prior and exclusive jurisdiction* of the persons of said creditors, and of said Wadley and of the subject-matter of the controversy between them as to the assets of said Company, and of said records of said Company, the *same* creditors, who had first invoked and were then enjoying the prior jurisdiction of said Federal Court by the Equity Suits brought therein by themselves against said Company and Wadley, had caused themselves and their counsel in said suits, to be summoned, as witnesses, before the Grand Jury of said County Court of Wythe County, Virginia, and had illegally procured an indictment to be made against said

Wadley for the embezzlement of the very same assets that were under the control and jurisdiction of said Federal Court and being adjudicated by it, and that said indictment was procured by the *misuse* and *abuse* of certain records of said Federal Court in said equity suits, including the deposition of said Wadley taken therein, which were taken from the files of said suits in said Court without the knowledge or leave of said Court and used and read by said creditors or counsel before said Grand Jury, and, in this way had procured said indictment.

The petition for Habeas Corpus further represented that said creditors had put said indictment on foot against said Wadley for the purpose of *terrifying him into the payment to them of the debts* claimed by them from the Company in said Equity Suits, and the petition and exhibits showed that upon these three grounds, among others, viz:

First.

Because the creditors who originated and were conducting the prosecution against Wadley, as well as the subject-matter thereof, and Wadley himself, were all under the prior jurisdiction of the Federal Court.

Second.

Because of the said misuse and abuse of the said Federal records and deposition of Wadley by said creditors for the purpose named.

Third.

Because the prosecution was put on foot and was being conducted as an illegal means of coercing Wadley to pay them the debts due them from said Company.

That said Federal Court, on 8th June, 1894, awarded said Wadley an injunction, against said creditors, enjoining them from all further prosecution of said indictment, and enjoining the use of said Federal records for the purposes of said prosecution *until the further order of said Federal Court.* The petition for Habeas Corpus and exhibits showed that this injunction was duly perfected, and that, afterwards on 31st January, 1895, it came on to be heard before said Federal Court, upon bill and exhibits, answers and exhibits, replications, demurrers and joinder, depositions taken before a Master of said court appointed for the purpose, and upon motion, after notice, for a dissolution of said injunction and that, upon a full hearing of said cause *on its merits*, the Federal Court sustained the bill, overruled the motion to dissolve said injunction, and continued it in full force, and that said decree of 31st January, 1895, has never been appealed from and remains in full force and effect. The Hon. Nathan Goff who rendered said decision of the Federal Court, on the 31st January, 1895, filed an elaborate written opinion in the case which was exhibited with the petition for the Habeas Corpus, and is reported 65 Fed. Rep. p. 667, and which opinion gives the grounds of said decision with a full citation of law sustaining it. In short, the injunction had been awarded under § 716 R. S. U. S. which gives to Federal Courts the power to issue all writs necessary to the exercise of their respective jurisdictions.

The petition for Habeas Corpus and exhibits further show that, notwithstanding said prior jurisdiction by the Federal Court of the persons of said creditors, of said Wadley, and of the subject-matter of said prosecution and notwithstanding the decree of said Federal Court of 31st January, 1895, refusing to dissolve said injunction,

the said creditors persisted, *by their counsel, acting as assistant prosecutors,* in prosecuting said indictment in said State court, by demanding the committal to prison of said Wadley, and that on the 5th August, 1896, upon this breach of said injunction being again brought to the attention of said Federal Court by a petition filed in said suits in Equity, that Court, by Hon. Charles H. Simonton, issued a further restraining order prohibiting all further proceedings in said prosecution in said County Court and especially from committing said Wadley to prison under same until the further order of the court, and awarding rules for contempt against said creditors, counsel and all persons violating said orders of the Federal Court. None of these orders were appealed from, and all remain in full force and effect, that is to say:

A.

The order of Federal Court of June 8, 1894, granting the injunction by Judge Goff.

B.

The decree on the merits, of January 31, 1895, sustaining the bill and overruling the motion to dissolve the injunction by Judge Goff.

C.

And the order of August 5, 1896, enlarging restraining order by Judge Simonton.

Proceedings on Habeas Corpus.

This petition for Habeas Corpus was presented, (out of court,) to Hon. Charles H. Simonton *as Circuit Judge* of the Fourth Circuit, and on said 11th August, 1896, *he* (not tbe Clerk) issued, *as Circuit Judge* his writ of Habeas Corpus upon the petition of said Wadley, and addressed it to said Harkrader, Sheriff, making said

writ returnable "before me Charles H. Simonton, Judge," "at Greenville, South Carolina on the 14th day of August, 1896." See writ p. 5. He signed the writ "Charles H. Simonton, Judge." The Return of said Sheriff was addressed to "the Honorable Judge," &c., and he produced the body of said Wadley before said Judge at Greenville, South Carolina, on said 14th August, 1896, "in obedience to the command and direction thereof;" and on said 14th August 1896, the Hon. "Charles H. Simonton Circuit Judge," heard said writ, on the return of sheriff, traverse or denial thereof by petitioner, and petitioner's demurrers to Return, and *Judge Simonton discharged* said Wadley, because said indictment set up was "notwithstanding the injunction and writ of this Court" and "as said Court cannot prosecute said indictment pending said injunction," and ordering that "the said H. G. Wadley hold himself subject to the further order of this Court." The order of discharge of 14th August, 1896, was then addressed and sent "To I. C. Fowler, Clerk of this Court at Abingdon, Va.," and it and petition and papers were "filed" in the Circuit Court of the United States for the Western District of Virginia at Abingdon, "Fourth Circuit" on August 18, 1896. The Sheriff obeyed this order of Judge Simonton and discharged said Wadley. Thus ended the Habeas Corpus proceedings, until *October 8th, 1896*, when a petition for appeal and an assignment of errors were filed in the Clerk's office of the Circuit Court of the United States for the Western District of Virginia at Abingdon, see p. 49. *There was no allowance of appeal.* until 12th October, 1896, when "Charles H. Simonton Circuit Judge," subscribed "The prayer of this petition allowed," and upon this appeal on Habeas Corpus case is here.

On Motion to Dismiss Appeal.
The Law and Facts Applied.

This, then, is an Appeal from an order discharging a prisoner on a writ of Habeas Corpus. It was a proceeding before Hon. Charles H. Simonton, Circuit Judge for the Fourth Circuit, at his Chambers in Greenville, South Carolina, for the discharge of the prisoner from the custody of the Sheriff and jailor of Wythe County, Virginia, under an order of commitment from the County Court of Wythe County, Virginia. The petition for writ of Habeas Corpus was presented to Judge Simonton who *as Circuit Judge*, issued a writ of Habeas Corpus (found on p. 5 of transcript,) and made it returnable "before me, Charles H. Simonton, Judge of our Circuit Court of the United States within and for the said District aforesaid *at Greenville, South Carolina*, on the 14th day of August, 1896." The record p. 6, shows that the jailor made his Return to said 14th August, 1896, and that the prisoner filed his Demurrer and Denial and traverse to said Return. See pp. 10 and 11, upon consideration whereof on said 14th of August, 1896, Charles H. Simonton, *Circuit Judge*, made and signed an order discharging said prisoner from custody, and at foot of order, addressed it to "I. C. Fowler, Clerk of this Court at Abingdon, Va." meaning Clerk of the United States Court for Western District of Virginia, wherein on 18th August, 1896, the order was "filed." See p. 12.

From this order the jailor was allowed an appeal to this Court by said Circuit Judge, see p. 49, and the case was docketed here as an "Appeal from the Circuit Court of the United States for the Western District of Virginia." The form of the docket entry, however, does not change the character of the proceeding from which

the appeal was taken, and that was clearly before the *Circuit Judge, sitting as a Judge* and not as a court.

We submit that this appeal should be dismissed for the following reasons:

First.

Because no appeal lies to this Court from an order of a *Circuit Judge* of the United States, sitting as a Judge, and not as a Court, discharging a prisoner brought before him on a writ of Habeas Corpus.

Carper v. Fitzgerald 121, U. S. 87, "when the writ of Habeas Corpus is issued by a Circuit Judge, and made *returnable before him*, not before the Circuit Court, there is no appeal from his decision." Curtis "Jurisdiction of United States Courts," bottom of p. 222.

2 Foster Federal Practice, page 751.
In re Palliser, 136 U. S. at page 262.
McKinney v. James, 155 U. S. at page 687.
Lambert v. Barrett, 157 U. S. at page 697.

Second.

Because the order of the Circuit Judge was not *final*, and hence not appealable. The prisoner was discharged "pending said injunction," and the prisoner is held subject to the further order of the United States Circuit Court. See p, 12.

That such order was not appealable, because not *final*.

Carper v. Fitzgerald 121 U. S. at page 89.
Foster Federal Practice, § 368, at page 752.
McLish v. Roff, 141 U. S. at pages 661–2.

Third.

A.

Because this being an appeal under The Judiciary Act of March 3, 1891, Chap. 517, § 5, it can come here only on the "question of jurisdiction" of the Circuit Court

of the United States. In such cases the Act. provides that the question of jurisdiction *alone* shall be certified to this from the court below. There is no *certificate* of jurisdiction or certificate of any kind in this case. A certificate, from the court below, as to the distinct question of jurisdiction involved, has been decided by this Court to be indispensable to the jurisdiction of this Court.

Maynard v. Hecht, 151 U. S. at page 324.
Colvin v. Jacksonville, 157 U. S. at page 368.
Van Wagenen v. Sewell, 160 U. S. at page 369.
Chappell v. United States, 160 U. S. at pages 499, 507.
Davis v. Giessler, 162 U. S. at page 291.

B.

The First and Second Assignments of Error pp. 49, 50 do claim now that the Circuit Court of the United States had no jurisdiction over the matter involved, but neither the Return p. 6, nor any pleading or paper in the case ever raised the question of the want of jurisdiction by the United States Circuit Court of the Habeas Corpus case, and, as already stated, there is no certificate of jurisdiction by said court below.

C.

The said First and Second Assignments of Error are too general; they do not indicate any specific question of jurisdiction; and they are not such sufficient statements of the question of jurisdiction as will supply the want of a formal certificate of jurisdiction required by § 5 of said Judiciary Act. It is true that this Court, in a few cases, has modified the rule to the extent that no certificate is necessary where the record itself presents the single matter of jurisdiction, but in those cases seeming to modify the rule, it is decided that the precise question of jurisdiction must be clearly, fully and seperately stated in the record, that no mere general statement of want of

jurisdiction, no mere suggestion that the jurisdiction of the Court was in issue, will suffice, nor will the Court itself search, nor follow counsel, to find the question of jurisdiction.

Chappell v. United States, 160 U. S. at page 499.
Van Wagenen v. Sewell, 160 U. S. at page 371.

D.

But an Assignment of Error cannot *import into a cause* questions of jurisdiction which the record does not show were distinctly and clearly raised in the Court below, and rulings asked thereon so as to give jurisdiction to this Court under Judiciary Act March 3, 1891, § 5.

Ansbro v. United States, 159 U. S. at page 697.
Cornell v. Green, 163 U. S. at page 89.
The Bayonne, 159 U. S. at page 687.

Fourth.

Because the other Assignments of Error 3, 4, and 5 seek, by this Appeal in the Habeas Corpus case, to attack *collaterally* the decrees and orders of the Federal Court of June 8th, 1894, found, p. 24, of January 31st, 1892, p. 29, and of August 6th, 1896, p. 45, rendered in certain separate and independent Equity causes in which injunctions were issued and sustained, enjoining the said creditors from the proceedings named in said County Court. There were no appeals in said Equity causes, and they are final until reversed on appeal. The Assignments 3, 4 and 5, attack these decrees and orders *collaterally*, and make them the ground of error relied on therein. The Federal Court had prior and exclusive jurisdiction of the subject-matter of said prosecution, of Wadley, and of the creditors prosecuting him, and even if these decrees and orders were erroneous they were not void, and such errors cannot be reached by this Appeal in another case, viz: the Habeas Corpus case.

Just such an effort was made in the case of In re Lennon, 150, U. S. p. 393. See at p. 400, where the Court held that an appeal in Habeas Corpus *relates to the jurisdiction* of the court below in the Habeas Corpus case and to no other case.

The effort is now made, by this appeal from the order of discharge in the Habeas Corpus, to review the decrees and orders in the Equity (Injunction) case of H. G. Wadley v. Blount & Boynton, et al. It would be allowing this appeal to perform the function of an appeal in the injunction cases.

In re Lennon, 150 U. S. at p. 400. The same principle is also clearly laid down. Carey v. Houston &c. R. R., 150 U. S. at p. 171.

This is a direct appeal from the judgment of the Circuit Judge on the Habeas Corpus. No question as to the jurisdiction of the Circuit Judge, by whom this case was decided, has been certified to this Court nor was such certificate ever asked for in that court; nor was any question of the jurisdiction of that court, in this case, raised or presented, in any way, by any form of pleading.

The questions of jurisdiction presented, by the 3, 4 and 5 Assignments of Error, relate not to the question of the jurisdiction of the Circuit Court in this (Habeas Corpus) case but relate to the jurisdiction of that Court in the Equity suits of H. G. Wadley v. Blount & Boynton et al, in which writs of injunction were issued restraining the creditors from proceeding in County Court of Wythe County, Va., by said indictment. The fifth section of Judiciary Act of March 3, 1891, does not authorize a direct appeal to this Court in a suit upon a question involving the jurisdiction of the Circuit Court *over another suit previously determined* in the same court, and no

question of jurisdiction over that other suit or over the decrees passed therein, can avail to sustain the direct appeal.

Carey v. Houston R. R., 150 U. S. 170, and In re Lennon Ibid are cases in point.

Fifth.

Because the record does not show that the "Appeal" allowed was ever "filed" in the United States Circuit Court. For even though in fact it had been delivered to and lodged with the clerk, this court is without jurisdiction.

The *"filing"* of the writ of Error or Appeal, in the court below, is essential to the transfer of the jurisdiction of the case from that court to this, and until that is done, this Court is without jurisdiction to entertain the case.

Brooks v. Norris, 11 How. at page 207.
Mussina v. Cavazos, 6 Wall at page 355.
Mutual Life Co. v. Phinney, 76 Fed. at page 617.
Where cases are collated.

The petition for appeal and assignment of Errors were filed October 8th, and while allowance of appeal was October 12th, *it seems never "filed"* but merely lodged with the clerk. See page 49.

On Merits!

But if our motion to dismiss this appeal is overruled, and this Court should, at all, consider the validity of the decrees and orders in the Equity case, we beg to refer to the case itself which is reported as Wadley v. Blount et al, 65 Federal Reporter page 665, and we submit that the decrees and orders of the Federal Court are valid.

As before stated, as far back as October, 1893, the said Federal Court acquired *prior* and therefore *exclusive* jurisdiction of all the assets of the Wytheville Bank-

ing and Insurance Company, of the creditors, of Wadley, and of the issues and controversies of misappropriation and embezzlement of the assets by Wadley the President. The Court had appointed a Receiver of the assets, had issued restraining orders, had appointed its Master to take, settle and report the necessary accounts, who had the assets, who and what liable for them, and the standing of Wadley's accounts with the Company, and the Master was proceeding to do so. Pending said investigation and account the deposition of H. G. Wadley was taken before said Master, in said causes. The creditors, Blount & Boynton and others, the plaintiffs in said Equity causes, and who themselves had invoked the prior jurisdiction of said Federal Court, about April, 1894, abstracted copies of the said deposition of said Wadley and other records and papers, from said causes, without the leave or knowledge of the Court, or Commissioner, and then had their counsel summoned as witnesses before the Grand Jury of Wythe County Court, Va., and carried said deposition and records and papers of the Federal Court before said Grand Jury, and used and read them as the basis of an indictment for the embezzlement of the very same assets of the said Company which, at that very time, were being administered, investigated and adjudicated by said United States Court in the said equity suits, brought by said same creditors by said same counsel. For this violation of the prior jurisdiction of the United States Court, and for the misuse and abuse of its records, and for other reasons fully set forth in Judge Goff's opinion, p. 32 et seq. notably the attempted intimidation by said prosecution, which we will give in the words of Judge Goff, at page 38 of Transcript. "I find from the testimony in the case, that after the creditors of the Wytheville Banking and

Insurance Company had intervened and been made parties complainants in the said suit of Paul Hutchinson, adm'r &c. against that company and others, and after they had proven their claims before the master and he had formulated his report, that they in a meeting called and held for the purpose of determining the proper course for them to pursue, in the light of the case as shown by said report and Wadley's deposition, concluded to submit to him, the said Wadley an offer to adjust the debts reported by said master, (as to which it was claimed he was individually liable,) at the rate of fifty cents on the dollar, at the same time having an understanding among themselves that if he declined such proposition that they would procure his indictment in the county court of Wythe county, and prosecute him for the misappropriation of the funds of said company,—the money required to carry on such criminal procedure being arranged for at the same meeting that the offer of conference was agreed to. And also do I find that when such an offer was declined by Wadley, that they proceeded to procure his indictment, using for that purpose a copy of his deposition so given before the master of this court, and evidently procuring the summoning of their counsel as witnesses before the grand jury (some of whom declined to go before that body unless they were duly subpœnaed so to do) and having them assist in the preparation in the bill of indictment, and in the prosecution of Wadley under it. That the criminal procedure when first suggested was intended to aid the creditors in adjusting their debts with Wadley is, I think without doubt, and the fact that the effort failed is, so far as the matter now before me is concerned, immaterial. The circumstances were, it must be conceded, unusualy anomalous, such as to naturally cause excitement and indignation, yet nev-

ertheless as the evidence discloses conduct that cannot be justified and is far from being conducive to the fair administration of justice; that is in fact most reprehensible, dangerously near the border land that divides impropriety from criminality, and I truly hope that never again in this jurisdiction will an effort be made to duplicate it," that Court enjoined the creditors from proceeding in the county court, by said indictment and the several orders and decrees named were entered therein from time to time. It was also an *indirect* effort, by the use of Wadley's depositions, to compel him to testify against himself, and thus secure an indictment against him. This was a violation of § 860 R. S. U. S. that forbids the use of records of a Federal Court, in any other court, against a party thereto, and besides, was a flagrant contempt of said Federal Court by said plaintiffs and counsel. The Commonwealth Attorney of said county was made a party and was enjoined from the use, and abuse of said deposition and records of the Federal Court, in said prosecution, and from an abuse of his authority as such; for whether he was cognizant of the true facts and nature of the prosecution, or was ignorant of them, in either event, the procurement of the indictment by said creditors, in the manner explained, was an abuse of the functions of a Grand Jury, and a violation of Wadley's rights as an American citizen, and a contempt of the Federal Court, and he should not have been permitted by the Federal Court to give the aid of his office to such a prosecution, which sought to convert a Grand Jury into a Collection Agency to collect debts by terror of prosecution.

We might rely on the very able opinion of Judge Goff, filed in this record at p. 32 of transcript, and in 65 Fed. Rep. p. 675, but we supplement it by many additional authorities, which are not elaborated or cited by the

learned Judge, some of them found since his decision, but all fully sustaining him in every regard.

A.

We assert the following legal propositions:

1.

That the Federal Court of Equity, having first acquired jurisdiction of the litigation, by the Equity suits, its jurisdiction was exclusive of all other courts, and its orders and decrees, or jurisdiction could not be defeated by the institution of proceedings in any other court, at law or in Equity, Federal or State, civil or criminal.

The same creditors who had put on foot the criminal proceedings in Wythe County Court, whose counsel furnished the data, and wrote the indictment, who had themselves sent before the Grand Jury as witnesses, and who became the special prosecutors of the case, were the complainants in the equity suit then pending in the United States Court at Abingdon, and on exactly the same controverted issues.

Not content to wait for the United States Court, that first acquired jurisdiction of the parties and the issue of law and fact, to settle and adjudicate the questions put in issue there, they went to the county court, and had the defendant indicted for the same matters, and on same proofs, that were being litigated against him in the United States Court.

See the law against this course of conduct,

"A court once taking jurisdiction of a controversy is bound to continue that jurisdiction to the final determination of the *entire* controversy."

Central Trust Company v. Wabash R. R. Co., 29 Fed. Rep. 546.

"A Bill for an Injunction to prevent interference, by *criminal procedure*, will lie, when the parties sought to be enjoined, have as plaintiffs, submitted themselves to the court, by a bill in equity, as to the matter or right involved or affected by the criminal procedure.

Spink v. Francis and others, 19 Fed, Rep. p. 670, both Billings and Pardee, J. J. of the Circuit Court of the United States for Louisiana, concurring in this decision.

In Williams v. Frances et als, 20 Fed. Rep. p. 567, it was decided as follows:

"Equity Jurisdiction."

"A Court of Equity can interfere by an order, with a party conducting a *criminal procedure* when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court, by a Bill of Equity as to the matter, or right, affected by, or involved in the criminal procedure; but the pursuer and the pursued must be identical in each case i. e., the defendant in the bill and in the indictment must be the same person, and the person preferring the bill and the criminal charges must also be the same. As to parties and controversy, the inquiry is analogous to that in regard to the plea if *lis pendens*.

On p. 568 of the same case, the opinion of Lord Elden and Lord Cairnes are quoted to same effect as above. Lord Hardwicke established the rule, as shown also on p. 578 of same case.

But the Circuit Courts of the United States are fully supported on this point.

In Re Sawyers, 124 U. S. R., p. 211, Mr. Justice Gray said:

"Modern decisions in England, by eminent equity judges, concur in holding that a Court in Chancery has

no power to restrain *criminal* proceedings, *unless they are instituted by a party to a suit already pending, before it, and to try the same right that is in issue there.*

This is the *precise point* in this case. Mr. Wadley was pursued in equity in the United States Court by these creditors and was sought to be held civilly liable for actual fraud, and the unlawful conversion of the assets of the company, and he was indicted *on exactly the same facts and issues* by these same creditors. In Re Sawyers ante, p. 122, Mr. Justice Field said:

"In many case proceedings, criminal in their character, taken by organized bodies of men, or individuals, tending, if carried out, *to despoil one of his property or other rights, may be enjoined by a Court of Equity.*

Mr. Justice Story, in his Equity Jurisprudence, vol. 2. § 893, p. 223, thus clearly puts the rule:

"There are, however, cases in which Courts of Equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition *But this restriction applies only to cases, where the parties, seeking redress by such proceedings, are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally at the same time from proceeding, upon the same matter of right, for redress in the form of a civil suit, and of a criminal prosecution.* In such cases, the injunction is merely incidental to the ordinary powers of the court to impose terms upon persons, who seek aid in furtherance of their rights."

In Robert's Principles of Equity, it is said:

"Equity will restrain proceedings in any criminal, or other matter, which is not strictly of a civil nature, *where*

the persons prosecuting the same are also, at the same time proceeding, as plaintiffs, in equity in regard to the the same matter."

"Equity Practice" (State and Federal) by Beach, at § 761, vol. 2, thus lays down the present modern rule to be:

"It is a rule of almost universal application, both in England and in this country, that a Court of Equity has no jurisdiction of injunction, to restrain a criminal proceeding, whether it be by indictment or summary process, *unless* the *criminal proceedings* be brought by a party to a suit already pending in the Equity Court, and to try the same rights that are in issue there."

But the right of a Court of Equity to award an injunction to restrain complainants in a suit in that court from prosecuting a *criminal proceeding* against the defendant even though such criminal case be instituted in another court was established as far back as the days of Lord Hardwicke, for we find he did that very thing himself in the case of The Mayor and corporation of York v. Pilkington, reported 2 Atkins, 302. In that case certain plaintiffs in a chancery bill and cross bill to establish in equity their sole right of fishing in a certain stream, while their chancery bill and cross bill were still pending in equity, caused the defendant to be indicted at the York Criminal Court for a breach of the peace for such fishing, and Lord Hardwicke awarded an injunction, against the plaintiffs in equity and restrained them from all further criminal proceedings in other courts, and stopped all proceedings on the indictment until the final hearing of the other cause in equity was had. He said where parties had submitted their rights to a Court of Equity, it certainly

had a jurisdiction, and might interpose to stop proceedings on indictment.

> Leading Cases in Equity, vol. 2, part 2, American notes, top page 95, marginal 67.

In the same case, Lord Hardwicke said that if a plaintiff filed a bill in equity, in a court against a defendant, for a right to land and a right to quiet the possession thereof, and after that, he had preferred an indictment against such defendant for a forcible entry into said land, the Court of Equity would certainly stop the indictment by an injunction. See supra.

The principle involved, in allowing the injunction, is the principle, pure and simple, that the court that *first acquires jurisdiction* of parties and the subject-matter, has full and complete cognizance over such parties, and such subject-matter, for all purposes, and can and will restrain and enjoin any inequitable conduct on their part, as the conditions and terms of enjoying such prior jurisdiction.

The then state of affairs, if not prevented by injunction, might have presented the anomaly of Mr. Wadley, being adjudged on the law and facts of his defence, in the Federal Court, *as not liable civilly, for said assets*, and yet by a private prosecution, in said County Court of Wythe, by an indictment for the embezzlement of said assets, he might have been convicted, on the same evidence, upon which a Federal Court had held him, civilly, not liable therefor. It is not believed that a court will allow any possibility of such anomaly but will vindicate its prior jurisdiction. It would have been ample time for these creditors to prosecute Mr. Wadley when the Federal Court that had full, complete, and prior jurisdiction of the parties and the subject of controversy, by its decree, had

adjudicated him to be civilly liable. The creditors were converting a Grand Jury into a "collection agency" to enforce their claims, pending before, but not yet adjudicated, by the Federal Court.

2.

That Jurisdiction Exclusive, which first Attaches.

JURISDICTION ACTUALLY ACQUIRED.—Of two courts having concurrent jurisdiction of any matter, the one whose jurisdiction first attaches acquires EXCLUSIVE CONTROL of all controversies respecting it involving substantially the same interests.

Bruce v. Manchester & K. R. R., 19 Fed. Rep., at page 342.

When a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it, HOLDS IT TO THE EXCLUSION of the other until its duty is fully performed, and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and *criminal cases.* In Re James, 18 Fed. Rep., 853.

In the case of Taylor v. Taintor, 16 Wall. 367, the Supreme Court of the United says:

"When a State court and a court of the United States may each take jurisdiction (as in this case) the tribunal which first gets it, holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; *and this rule applies alike in both civil and criminal cases.* It is indeed a principle of universal jurisprudence that, when jurisdiction has attached to a person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

3.

Federal Interference with State Courts by Injunctions Proper.

U. S. Rev. Stat. § 720, prohibiting injunctions by any court of the United States to stay proceedings in a State court, *does not apply* where the Federal Court has first obtained jurisdiction of the subject-matter of the proceedings and of the parties in the State court. This section must be construed in connection with U. S. Rev. Stat. § 716, which provides that the Federal Courts shall have power to issue *all* writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Sharon v. Terry, 36 Fed. Rep., at page 337. Opinion by Mr. Justice Field.

It is said in 12th Am. and Eng. Ency. of Law p. 292, "This rule would seem to be vital to the harmonious movements of courts whose powers may be exerted within the same sphere and over the same subjects and persons. The only course of safety is where one court, having jurisdiction over the subject, has possession of the case for all others, with merely co-ordinate powers, to abstain from any interference. Any other rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results."

Brooks v. Deplaine, 1 Mary, Ch.Dec. 351, 354.

4.

In case of Conflict of Authority; Relation of State to Federal Court.

Exclusiveness of jurisdiction first acquired.

Where a court of competent jurisdiction acquires possession of the subject-matter of controversy, and the right of the party to prosecute his action first attaches,

the right of the court to retain the case. and of the party to prosecute it, can NOT be DEFEATED by the institution of proceedings in ANOTHER COURT, although of co-ordinate jurisdiction. Authorities cited in

Saylor v. Simpson, (Ohio) 10 West. 453, 12 N. East., 181.

Prior Jurisdiction of the Controversy in Federal Court.

This case is one for the application of the rule that the court, Federal or State, which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the investigation *to the exclusion of all interferences* by other courts of co-ordinate jurisdiction.

Williams v. Benedict, 8 How., 111.
Taylor v. Carryl, 20 How., 583.
Hagan v. Lucas, 10 Peters, 400.
Buck v. Colbath, 3 Wall., 334.
Heidritter v. Eliz; Oil Cloth Co., 112 U. S. R., 294.
Union Trust Co. v. Rockford Co., 6 Bissell, 197.
Segwick v. Minch, 6 Blatchford, 156.
Judd v. Banker's and Mer. Tel. Co., 31 Fed. Rep. 183.

The 1894 edition of "Extraordinary Relief" by Spelling, says that while the State courts do not recognize the right of a Court of Equity to enjoin a criminal prosecution, yet a different rule seems to prevail in Federal courts, i. e., they can enjoin criminal prosecutions where the Federal Court has already acquired jurisdiction of the parties and subject-matter. See Spelling, p. 87 § 71, note. He cites and approves:

19 Fed. Rep. p. 670.
20 Fed. Rep. p. 567.

5.

Common Practice—Injunctions to stay Suits in State Courts.

Where the United States Court acquires jurisdiction of a case by removal *or otherwise*, and afterwards parties

institute proceedings in State courts that will, if successful, *defeat* the jurisdiction of the United States Court or *deprive plaintiffs therein of all benefit of any decree or judgment rendered in their favor*, the United States Courts may, by injunctions, lay hands on the parties and control their proceedings, although proceedings in a State court may be thus indirectly stayed or ended.

See cases of Missouri K. & T. R. R. Co. v. Scott et als, 13 Fed. Rep., p. 793, where it is said:

"That their said proceedings in said cause in said county court will annoy, harass and damage complainant compelling it to litigate in two different jurisdictions, and, by causing delays, deprive complainant of certain rights and remedies it has against the International Improvement R. W. Co., under certain contracts made with the company. Further, that there is now pending in this court a suit brought by defendant Scott against complainant for title to the lands in controversy and for damages, and involving the same issues as the case sought to be removed from the county court of Tarrant County.

Complainant asks for an injunction in the premises to restrain all the defendants, Scott, the party to the suit, Furman and Hogsett, attorneys, and Swayne, *Clerk of the county court*, from taking any further proceedings in said county court, or filing or issuing any further papers, writs, precepts, or litigating or forcing, or compelling any litigation, or taking any further action of *any kind or nature* in said county or any other court in the State of Texas."

"In so holding it is not intended to decide, that in proper cases, where the United States Court is first seized of jurisdiction, and parties are instituting thereafter such proceedings in state or other courts as will if successful,

defeat the jurisdiction of the United States Court or deprive plaintiff therein of any decree or judgment rendered in his favor, the United States cannot by injunction lay hands on parties, and control their proceedings, although hereby proceedings in a State court may be indirectly stayed or ended."

The case of Small v. Brown reported in 10th Ch. App. Law Rep. p. 64, contains a full discussion of the power of courts of equity that first obtain jurisdiction of controversy by injunction to restrain indictments.

In the Jurist, vol. 15, part 1, will be found the case of Turner v. Turner, where the power of a Court of Equity to enjoin indictments is discussed. An indictment was restroined because the same issues were sought to be litigated in different courts.

Section 720 Revised Statutes of the United States, p. 137, passed March 2, 1793, does provide, in general terms, that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such proceedings may be authorized by any law relating to bankruptcy."

To a casual reader, this would *seem* to prohibit an injunction in the case at bar, but this section 720 has been construed by the Federal Courts not to apply to cases like ours.

It has been decided that the above section 720 is to be construed with section 716 which is as follows:

"The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statue, which may be necessary for

the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

For the decisions that § § 716 and 720 must be construed together. See

Gould and Tucker's Notes, p. 191, and Fisk v. Union Pacific R. R. Co., 10 Blatchford, p. 518.

It has been decided that this prohibition in § 720 does not apply where the jurisdiction of a Federal Court has *first* attached.

Fisk v. Union Pacific R. R. Co., 10 Blatchford, p. 518.
Wagner v. Drake, 31 Fed Rep., p. 851.
Sharon v. Terry, 36 Fed. Rep., p. 838.
French v. Hay, 22 Wall, p. 253.
Dietzsch v. Huidekouper, 103 U. S. R., p. 494.
Gould and Tucker's Notes, p. 192.

And it has, under this section 720, been decided that: "A Circuit Court of the United States may issue an injunction restraining a person from commencing a suit civil or criminal, in a State court.

Live Stock Association v. Cresent City, 1 Abb. U. S., p. 338.
State Lottery Company v. Fitzpatrick, 3 Wood, p. 255.

Restraining Proceedings in State Courts.

This section applies to the restraint of suits, which, but for the injunction, this State court would have jurisdiction over, (In Re Long Island, etc., Trans. Co., 5 Fed. Rep., 628.) and only such as are commenced in the State court *before proceedings in the Federal Court have been commenced* (Fisk v. Union Pac. R. R. Co., 10 Blatch., 518;) for, if a suit be commenced in the Federal Court subsequent proceedings in a State court may be restrained. Id. "Proceedings" include all steps taken in a suit from its inception to final process. United States v. Collins, 4 Blatch., 142."

"Although the circuit court has no jurisdiction over proceedings in the State court, yet this section does not prevent it from releasing a defendant from process out of a State court violating its protection, or to prevent abuse of its privileges. Bridges v. Shelton, 18 Blatch., 517; S. C. 7 Fed. Rep., 45; Hurst's case, 4 Dall., 387. So a circuit court may restrain parties from taking out a criminal process under State law, which impairs the obligation of contracts. (Lou. State Lot. Co. v. Fitzpatrick, 3 Woods, 222;) nor does this section prohibit the district court, after a transfer of the ship and freight under the "limited-liability act" from restraining the prosecution of *any suit growing out* of the disaster thereto commenced and then pending in a State court (In Re Long Island, etc., Trans. Co., 5 Fed. Rep. 627)

6.

Unconstitutional use of Mr. Wadley's Deposition.

As has been stated, Mr. Wadley's deposition was taken in the equity case before Commissioner Gray, and the same creditors, by their counsel, who were prosecuting that equity suit, without leave of the court, obtained a copy of that deposition, and, by a subpœna duces tecum, had it produced by said counsel of creditors before the Grand Jury of Wythe County, at its May term, and on it alone, (or even with other evidence, it may be) the said creditors procured the indictment of Mr Wadley for the embezzlement of the *same assets* that they set up in their said equity suit in this court. The use of that deposition was a violation

FIRST. Of the rights of the Federal court, in the misuse and abuse of one of its records. If they had desired the use of that deposition, and could have used it at all, it was

not only due to the court, but was necessary, under the law, that they should have obtained leave to use the copy, or the original. This is an inflexible rule of court, and it was violated in this case, but

SECOND. Under Article V. of the Constitution of the United States, no man can be compelled to criminate himself, or to furnish evidence for that purpose. As this cannot be done directly, so it cannot be done by indirection. His deposition or examination compelled, by civil process, or taken in any equity suit, pending in a Federal Court, cannot be used or read as evidence against him in any criminal proceedings in any other court. This would be doing, by indirection, what the Constitution prohibits from being done directly.

For the law on above, see section 860, Revised Statutes of the United States, act passed February 25, 1868, This act, as its preamble recites, was passed to *protect the citizen in making disclosures, as parties to suits*, or in *testifying as witnesses*.

In United States v. McCarthy, 18 Federal Reporter, p. 89, in an exposition of the Fifth Amendment of the Constitution of the United States, and of section 860 of said Rev. Stat. of the United States, it was decided that "no person shall be compelled, in *any* criminal case, to be a witness against himself," and, citing People v. Kelly, 24 N. Y., 74, that if a man be prosecuted criminally touching the matter about which he has testified on the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial," Brown, United States Judge, at bottom p. 89, says, "It is unnecessary to add anything to this exposition of the law. Section 860, of Rev. Stat., will be *a complete protection, against the use of any testi-*

mony which the witness may now give, in any other transaction or proceeding against him or his property."

The Supreme Court of Virginia, in the case of Kirby v. Commonwealth, 77th Va. Rep., p. 690, says through Lewis, President: "In a criminal prosecution other than for perjury or an action on a penal statute, *evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.* The testimny was therefore, improperly admitted, *and for this error* the judgment must be reversed, and a new trial ordered."

In 1st Bishop Crim. Procedure, (2nd Edition) sections 865, 867 and note to secton 867, it is held that only legal evidence can go to a Grand Jury.

See Justice Field's opinion in note.

To show the extent to which Federal Courts carry this protection,—Sawyer J. after commenting on the 11th Amendment, In Re Pacific Railway Company, 32 Fed. Rep., 241, 267, held that if the only protection to a party was that his answer should not be used against him in a criminal prosecution, it would be a protection of little avail to a party who should disclose criminal acts upon which an indictment should be found, and should, upon compulsion, indicate other sources of evidence by means of which the acts disclosed could be proved, as such acts may also constitute offences under the laws of the State against which Congress could afford no immunity, and Judge Shipman in another case cited, allowed a witness to refuse to answer a question which he claimed would criminate himself.

Surely a Federal Court would not require Mr. Wadley to testify in the equity suit, before its Master, and then allow that deposition to be used by the plaintiffs in equity, in a State Court, as the basis of a criminal indictment

against him. The Federal Courts will not allow the citzen to be so victimized, but by injunction will restrain such unconstitutional use of its records by suitors in its court. So far has this section 860 of the U. S. Rev. Stat. been carried that, in the case of Johnson v. Donaldson, 3 Fed. Rep., p. 22, an attempt was made to produce by supbœna duces tecum certain books and accounts of a party with the view of enforcing penalties and forfeitures against him, but under this section, the court held that irrespective of this statute, it would be contrary to all precedent and in violation to all common law rules, to use such evidence against an accused.

If Mr. Wadley had been carried as a witness before the Wythe County Grand Jury and these creditors had sought to make him testify against himself, he could have claimed his constitutional privilege that no man could be compelled to criminate himself, and yet these creditors, by their counsel, who put on foot the prosecution, and maintained it throughout, procured a mere copy of Mr. Wadley's deposition from papers in the hands of the Commissioner of the court, and said counsel carried the said deposition before the Grand Jury and used it in evidence against Mr. Wadley in violation of the Constitution and laws of the United States.

7.

Combination to Oppress and Intimidate.

The evidence in the case showed a combination on the part of the creditors to oppress, injure and intimidate Mr. Wadley by said criminal prosecution. There were over 100 of said creditors in pursuit of him, and *at a meeting held by them in Wytheville, on April 25, before the indictment*, they resolved to prosecute Mr. Wadley, and they agreed to contribute 2½ ₱ ct. of the amount of their

claims for this purpose, and after the indictment, they combined and confederated for the employment of counsel, the contribution of money, and otherwise for the purpose of carrying on the prosecution. These facts were abundantly proven, by the proceedings of said meeting and by circulars, urging other creditors to combine with them, and contribute to the fund for the purpose of carrying on the prosecution against Mr. Wadley, as will be seen from the quotation already made on pages 13 and 14, from Judge Goff's opinion.

B.

Habeas Corpus the Proper Remedy.

The United States Court, by its decree, final and conclusive, of 31st January, 1895, exhibited with the petition for Habeas Corpus in this case, enjoined the said creditors "from all further prosecution of said indictment;" and that Court through Judge Simonton, a United States Circuit Judge, by another order of the 5th August, 1896, prohibited any order of any kind, except a mere order of continuance being entered in said County Court; but it was disobeyed, and H. G. Wadley committed to the custody of the Sheriff or Jailor of Wythe County. Then, the question was, will the Federal Courts enforce their own orders or will they permit their orders to be contemptuously violated by mere County Courts of a State.

The Law.

In the 65th Federal Reporter, at top page 673, the Court said that it would not tolerate any such interference by the Courts of a State, with the judicial proceedings regularly before it, and exclusively within its jurisdiction.

Congress, by section 716 of Revised Statutes of the United States, has settled the question, as to the power

of that Court to protect its jurisdiction and enforce its orders. that section is this:

"The Supreme Court and the Circuit Court and District Courts shall have power to issue writs of Scire Facias. They shall also have power to issue all writs not specifically provided, for by this statute, WHICH MAY BE, NECESSARY FOR THE EXERCISE OF THEIR RESPECTIVE JURISDICTIONS, AND AGREEABLE TO THE USAGES AND PRINCIPLES OF LAW:

This broad language of the power of that Court to protect the exercise of its jurisdiction, by the usages and principles of common law, among which is habeas corpus, was all the law that was needed for the issuance of the habeas corpus and for the discharge of the accused from the said County Court. The reference to the authorities under this section, will show, that this Court has resorted to mandamus, injunctions, certiorari, supersedeas, executions, and habeas corpus, often and over again, where necessary to protect its jurisdiction.

But, this Court in terms, has held that habeas corpus is the proper remedy in a case like this, where a State Court has usurped a jurisdiction that does not belong to it.

In 137th U. S. Reports, In Re Grimley, Petitioner, the the United States Circuit Court for the District of Massachusetts, discharged the Petitioner upon a habeas corpus, and on appeal by U. S., this Court through Mr. Justice Brewer said, page 150: "It cannot be doubted that the civil courts of the United States, may, in any case, inquire into the jurisdiction of another court, and if it appears that the party was not amenable to its jurisdiction, may discharge him. He says, the single enquiry is, that of jurisdiction. That, jurisdiction being

established, the habeas corpus would be denied, and the Petition remanded; but that, jurisdiction wanting, the habeas corpus would be sustained and the Petitioner discharged."

In 131st U. S., Hans Nielsen, Petitioner, upon a habeas corpus, Mr. Justice Bradley held, that: Habeas corpus was the remedy. He says: "It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken are unconstitutional, or *for any other reason*, the judgment is void, and the defendant who is imprisoned under it, should be discharged from custody on habeas corpus."

In 149th U. S., at page 76, in re Frederich, Petitioner, Mr. Justice Jackson says, that habeas corpus is the proper proceeding to impeach the validity of a judgment or sentence of another court, *in a criminal case*, where the judgment or sentence attacked is clearly void by reason of its having been rendered by the court without jurisdiction, or by reason of the court having *exceeded* its jurisdiction in the premises.

Ex parte Royal, 117th U. S. Rep., p. 241 is the same effect.

In ex parte Siebold, 100th U. S. Rep. on page 375, Mr. Justice Bradley, for the Supreme Court of the United States, held that relief on habeas corpus to a prisoner, even under conviction and sentence of another court, could be granted where there was a want of jurisdiction in such court, over the person or cause, or some other matter, rendering its proceedings void.

In re, Mayfield, 141st U. S. Rep. on page 116, Mr. Justice Brown, said: that this Court has held in a multitude of cases, that it has power to enquire, with regard to the jurisdiction of the inferior court, *either in respect*

to the subject-matter, or to the *person;* and even if such enquiry involved an examination of facts, outside of, but not inconsistent with the record. And a Petition for a Writ of Habeas Corpus was granted, because of defect in the jurisdiction of the Court, that held Petitioner.

In 65th Fed. Rep., at page 676, it is stated, as follows:

"If the United States Court has first obtained jurisdiction of the case, it can then always take such action as may be required to maintain its authority, and enforce its decree."

And on same page the, the court says, that this applies to a criminal as well as to a civil suit.

Again, it is hardly necessary to encumber this brief with any authorities to show that a habeas corpus is the proper remedy for Petitioner who has proceeded against in a State Court, in violation of his constitutional rights as a citizen of the United States. If such references are needed, they will be found collated in 2nd Foster's Fed. Practice § 366. pages 726–7.

We respectfully ask for a dismissal of the appeal or for an affirmance of the Judgment in Habeas Corpus proceeding.

F. S. BLAIR,
Counsel for Appellee,
H. G. Wadley.

WYTHEVILLE, VA.,
December 11, 1897.

No. 280. 41.

Brief of Blair for Appellee (mo

Filed April 11, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~222~~ 280

NOTICE TO DISMISS, MOTION, AND BRIEF THEREON.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VIRGINIA, APPELLANT,

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief of F. S. Blair, Counsel for Appellee.

P. A. ST. CLAIR PRESS, WYTHEVILLE, VA.

NOTICE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 678.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VIRGINIA, APPELLANT.

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

To Hon. A. J. Montague, Attorney General of Virginia and ex-officio counsel for appellant:

Please to take notice that the appellee in the above entitled cause will on Monday, the day of , 1898, upon the coming in of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit a motion under Rule 6, to dismiss the appeal in this cause, and to affirm the judgment of the court below, and a printed copy of said motion of appellee to be then submitted to the court, and also a printed copy of the brief of argument in support of said motion, are hereto attached.

Dated Wytheville, Va., April 7th, 1898.

F. S. BLAIR,

Counsel for Appellee.

Service this day of a notice, motion and brief, of which the above and the annexed printed papers are copies, is hereby admitted.

Dated day of April, 1898.

MOTION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 678.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VIRGINIA, APPELLANT.

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

MOTION OF APPELLEE TO DISMISS APPEAL UNDER RULE 6 AND TO AFFIRM THE JUDGMENT APPEALED FROM, AND BRIEF OF ARGUMENT IN SUPPORT OF THE MOTION.

Now, H. G. Wadley, appellee in the above cause, by F. S. Blair his counsel, moves the Court to dismiss this cause and affirm the judgment appealed from, under and pursuant to the provisions of Rule 6 of this court; and in support of this motion he avers and shows reasons as follows:

1. Because no appeal lies to this court from an order of a Circuit Judge of the United States, *sitting as a Judge*, and *not as a court*, discharging the prisoner brought before him on a writ of Habeas Corpus.

2. Because the order of the Circuit Judge in this case was not *final*, and hence not appealable. The prisoner was discharged only "pending said injunction," and the prisoner is held subject to the further order of the United States Circuit Court.

3. Because this being an appeal under the Judiciary Act of March 3, 1891, chapter 517, section 5, it can come here only on the "question of jurisdiction," of the Circuit Court of the United States. In such cases the Act provides that the question of jurisdiction alone shall be certified to this from the court below. *There is no certificate of jurisdiction*, or certificate of any kind in this case. A certificate from the court below, as to the distinct question of jurisdiction involved, was indispensable to the jurisdiction of this court.

4. Because the assignment of error in this case, by this appeal in the Habeas Corpus case, is but an effort *to attack collaterally the decrees and orders of the Federal Court* of June 8th, 1894, found p. 24 of record, of Jan. 31st, 1892, p. 29, and of August 6th, 1896, p. 45, rendered *in certain separate and independent equity causes* in which injunctions were issued and sustained, and from which *no appeals have ever been taken*, and which are therefore *final* until reversed by appeal in those cases.

5. Because the record does not show that the appeal allowed in this case was ever "*filed*" in the United States Circuit Court. Even though, in fact, it was delivered to and lodged with the clerk, this court is without jurisdiction, for the "*filing*" *of the writ of error or appeal in the court below*, is essential to the transfer of the jurisdiction of the case from that court to this, and until that is done this court is without jurisdiction to entertain the appeal.

6. On the merits of the case we likewise submit that the appeal should be dismissed.

F. S. BLAIR,
Counsel for Appellee.
H. G. WADLEY.

BRIEF OF MOTION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 678.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, VIRGINIA, APPELLANT.

vs.

H. G. WADLEY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief for Appellee in Support of His Motion to Dismiss The Appeal in Above Cause and to Affirm the Judgment Appealed From.

On Motion to Dismiss Appeal. The Law and Facts Applied.

This, then, is an Appeal from an order discharging a prisoner on a writ of Habeas Corpus. It was a proceeding before Hon. Charles H. Simonton, Circuit Judge for the Fourth Circuit, at his Chambers in Greenville, South Carolina, for the discharge of the prisoner from the custody of the Sheriff and jailor of Wythe county, Virginia, under an order of commitment from the County Court of Wythe County, Virginia. The petition for writ of Habeas Corpus was presented to Judge Simonton who *as Circuit Judge*, issued a writ of Habeas Corpus (found on p. 5 of transcript,) and made it returnable "before me, Charles H. Simonton, Judge of our Circuit Court of the United States within and for the said District aforesaid

at Greenville, South Carolina, on the 14th day of August, 1896. The record p. 6, shows that the jailor made his Return to said 14th August, 1896, and that the prisoner filed his Demurrer and Denial and traverse to said Return. See pp. 10 and 11, upon consideration whereof on said 14th of August, 1896, Charles H. Simonton, *Circuit Judge*, made and signed an order discharging said prisoner from custody, and at foot of order, addressed it to "I. C. Fowler, Clerk of this Court at Abingdon, Va.," meaning Clerk of the United States Court for Western District of Virginia, with whom on 18th August, 1896, the order was "filed." See p. 12.

From this order the jailor was allowed an appeal to this Court by said Circuit Judge, see p. 49, and the case was docketed here as an "Appeal from the Circuit Court of the United States for the Western District of Virginia." The form of the docket entry, however, does not change the character of the proceeding from which the appeal was taken, and that was clearly before the *Circuit Judge sitting as a Judge* and not as a court.

We submit that this appeal should be dismissed for the following reasons:

First.

Because no appeal lies to this Court from an order of a *Circuit Judge* of the United States sitting as a Judge, and not as a Court, discharging a prisoner brought before him on a writ of Habeas Corpus.

Carper v. Fitzgerald 121, U. S. 87, "when the writ of Habeas Corpus is issued by a Circuit Judge, and made *returnable before him*, not before the Circuit Court, there is no appeal from his decision." Curtis "Jurisdiction of United States Courts," bottom of p. 222.

2 Foster Federal Practice, page 751.

In re Palliser, 136 U. S. at page 262.
McKinney v. James, 155 U. S. at page 687.
Lambert v. Barrett, 157 U. S. at page 697.

Second.

Because the order of the Circuit Judge was not *final*, and hence not appealable." The prisoner was discharged "pending said injunction," and the prisoner is held subject to the further order of the United States Circuit Court. See p. 12.

That such order was not appealable, because not *final*.

Carper v. Fitzgerald, 121 U. S. at page 89.
Foster Federal Practice, § 368, at page 752.
McLish v. Roff, 141 U. S. at pages 661–2.

Third.

A.

Because this being an appeal under The Judiciary Act of March 3, 1891, Chap. 517, § 5, it can come here only on the "question of jurisdiction" of the Circuit Court of the United States. In such cases the Act provides that the question of jurisdiction *alone* shall be certified to this from the court below. There is no *certificate* of jurisdiction or certificate of any kind in this case. A certificate, from the court bolow, as to the distinct question of the jurisdiction involved, has been decided by this Court to be indispensable to the jurisdiction of this Court.

Maynard v. Hecht, 151 U. S. at page 324.
Colvin v. Jacksonville, 157 U. S. at page 368.
Van Wagenen v. Sewell, 160 U. S. at page 369.
Chappell v. United States, 160 U. S. at pages 499, 507.
Davis v. Giessler, 162 U. S. at page 291.

B.

The First and Second Assignments of Error, pp. 49, 50 do claim now that the Circuit Court of the United States had no jurisdiction over the matter involved, but

neither the Return p. 6, nor any pleading or paper in the case ever raised the question of the want of jurisdiction by the United States Circuit Court of the Habeas Corpus case, and, as already stated, there is no certificate of jurisdiction by said court below.

C.

The said First and Second Assignments of Error are too general; they do not indicate any specific question of jurisdiction; and they are not such sufficient statements of the question of jurisdiction as will supply the want of a formal certificate of jurisdiction required by § 5 of said Judiciary Act. It is true that this Court, in a few cases, has modified the rule to the extent that no certificate is necessary where the record itself presents the single matter of jurisdiction, but in those cases seeming to modify the rule, it is decided that the precise question of jurisdiction must be clearly, fully and separately stated in the record, that no mere general statement of want of jurisdiction, no mere suggestion that the jurisdiction of the Court was in issue, will suffice, nor will the Court itself search, nor follow counsel, to find the question of jurisdiction.

Chappell v. United States, 160 U. S. at page 499.

Van Wagenen v. Sewell, 160 U. S. at page 371.

D.

But an Assignment of Error cannot *import into a cause* questions of jurisdiction which the record does not show were distinctly and clearly raised in the Court below, and rulings asked thereon so as to give jurisdiction to this Court under Judiciary Act March 3, 1891, § 5.

Ansbro v. United States, 159 U. S. at page 697.

Cornell v. Green, 163 U. S. at page 89.

The Bayonne, 159 U. S. at page 687.

Fourth.

Because the other Assignments of Error 3, 4, and 5 seek, by this appeal in the Habeas Corpus Case, to attack *collaterally* the decrees and orders of the Federal Court of June 8th, 1894, found, p. 24, of January 31st, 1892, p. 29, and of August 6th, 1896, p. 45, rendered in certain separate and independent Equity causes in which injunctions were issued and sustained, enjoining the said creditors from the proceedings named in said County Court. There were no appeals in said Equity causes, and they are final until reversed on appeal. The Assignments 3, 4 and 5, attack these decrees and orders *collaterally*, and make them the ground of error relied on therein. The Federal Court had prior and exclusive jurisdiction of the subject-matter of said prosecution, of Wadley, and of the creditors prosecuting him, and even if these decrees and orders were erroneous they were not void, and such errors cannot be reached by this Appeal in another case, viz: the Habeas Corpus case. Just such an effort was made in the case of In re Lennon, 150, U. S. p. 393. See at p. 400, where the Court held that an appeal in Habeas Corpus *relates to the jurisdiction* of the court below in the Habeas Corpus case and to no other case.

The effort is now made, by this appeal from the order of discharge in the Habeas Corpus, to review the decrees and orders in the Equity (Injunction) case of H. G. Wadley v. Blount & Boynton, et al. It would be allowing this appeal to perform the function of an appeal in the injunction cases.

In re Lennon, 150 U. S. at p. 400. The same principle is also clearly laid down in Carey v. Houston &c. R. R., 150 U. S. at p. 171.

This is a direct appeal from the judgment of the Circuit Judge on the Habeas Corpus. No question as to the jurisdiction of the Circuit Judge, by whom this case was decided, has been certified to this court nor was such certificate ever asked for in that court; nor was any question of the jurisdiction of that court, in this case, raised or presented, in any way, by any form of pleading.

The questions of jurisdiction presented, by the 3, 4 and 5 Assignments of Error, relate not to the question of the jurisdiction of the Circuit Court in this (Habeas Corpus) case but relate to the jurisdiction of that court in the Equity suits of H. G. Wadley v. Blount & Boynton et al, in which writs of injunction were issued restraining the creditors from proceeding in County Court of Wythe County, Va., by said indictment. The fifth section of Judiciary Act of March 3, 1891, does not authorize a direct appeal to this Court in a suit upon a question involving the jurisdiction of the Circuit Court *over another suit previously determined* in the same court, and no question of jurisdiction over that other suit or over the decrees passed therein, can avail to sustain the direct appeal.

Carey v. Houston R. R., 150 U. S. 170, and In re Lennon Ibid are cases in point.

Fifth.

Because the record does not show that the "Appeal" allowed was ever "filed" in the United States Circuit Court. For even though in fact it had been delivered to and lodged with the clerk, this court is without jurisdiction.

The "*filing*" of the writ of Error or Appeal, in the court below, is essential to the transfer of the jurisdiction of the case from that court to this, and until that is done, this Court is without jurisdiction to entertain the case.

Brooks v. Norrls, 11 How. at page 207.
Mussina v. Cavazos, 6 Wall at page 355.
Mutual Life Co. v. Phinney, 76 Fed. at page 617.
Where cases are collated.

The petition for appeal and assignment of Errors were filed October 8th, and while allowance of appeal was October 12th, *it seems never "filed"* but merely lodged with the clerk. See page 49.

F. S. BLAIR,
Counsel for Appellee.
H. G. WADLEY.

Supreme Court of the United States.

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE COUNTY JAIL, PPPELLANT.

vs.

H. G. WADLEY, APPELLEE.

CASE NO. 41, OCTOBER TERM, 1898.

IN THE SUPREME COURT OF THE UNITED STATES:

I. R. Harkrader, sheriff and keeper of jail of Wythe county, Virginia, Appellant.
vs.
H. G. Wadley, Appellee.

Case No. 41.
Dec. Term, 1898.

Petition for Certiorari, and rehearing of a judgment in above case entered 5th December, 1898, reversing judgment of the Circuit Court of United States for Western District of Virginia, Fourth Circuit of 18th August, 1896.

To the Honorable, the Judges of the Supreme Court of the United States.

The petition of H. G. Wadley, the Appellee in the above cause, would most respectfully represent to the court that, on December 5th, 1898, it ordered, adjudged and decreed, that the decree of the Circuit Court of the United States for the Western District of Vireinia in the above cause, be reversed with costs, and that the same be remanded to the said Circuit Court, with

directions to restore the custody of your petitioner to the said sheriff of Wythe county, Virginia.

The petition for rehearing will deal with but one point involved in the determination of said cause by this Honorable Court.

In said opinion this Hon'l Court said :

Mr. Justice Shiras delivered the opinion of the court.

"The appellee has moved the dismissal of the appeal because, as is alleged, the order discharging the prisoner on the writ of habeas corpus was made by a judge, and not by a court, &c.

It is, indeed, true, as was decided in Carper v. Fitzgerald,)121 U. S. 87) that no appeal lies to this court from an order of a Circuit Judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of habeas corpus. But this record disclosed that, while the original order was made at chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the Circuit Court at a stated term, and therefore the case falls within Inre Palliser, (136 U. S. 262)."

It is most respectfully submitted to the court that this court, on this vital point, was misled, by the purely clerical error of the clerk of the court below, who, by his own error, in copying the record, seemingly gave this court a jurisdiction that it did not possess. It will be seen from page 5 of the printed record, that on 11th August, 1896, petitioner presented his petition for a writ of habeas corpus, and that Chas. H. Simonton, Circuit Judge, awarded the writ and made it *returnable* "before me, Charles H. Simonton, Judge of our Circuit Court of the United States, within and for the said District afore-

said at *Greenville, South Carolina, on the 14th Aug. 1896.*

The writ was executed on 12th August, 1896, and the sheriff made his return on said 14th Aug. 1896, and, in obedience to said writ, on that day, produced the body of petitioner before "Charles H. Simonton, Circuit Judge," who on that day, made the order of final discharge, which on 15th Aug. 1898. (See page 12) he sent "to I. C. Fowler, clerk of this court at Abingdon, Virginia." The language of the order and its address to "I. C. Fowler, clerk of this court, at Abingdon, Va." imports that the Judge was not at Abingdon. Indeed, the habeas corpus proceedings, from the application for the writ to the order of final discharge, were in fact *vacation* or chambers proceedings, and that all of the orders were such.

For it has been discovered since the decision of this court in this case as will be seen from the affidavit of the deputy clerk of said court, Lindsey, here exhibited that the final order of discharge, appealed from, was in fact, entered by him as a vacatiou order and the order book on page 118, so shows, but that the said deputy clerk, in making the transcript of the record for this court, omitted to copy the portion of the entry on page 118 of the order book, that stated distinctly that the order was entered in vacation.

A correct copy of said entry on said page 118 of said order book, showing that the order of discharge was really entered, as a vacation order is herewith exhibited.

VACATION—August 15, 1896.

In the Circuit Court of the United States, for the Western District of Virginia. Fourth Circuit. In the

matter of the application of H. G. Wadley, for a writ of habeas corpus.

On this, the 14th day of August, 1896, came H. G. Wadley, the petitioner, by his counsel, Blair & Blair, and this cause coming on to be heard upon the petition for a writ of habeas corpus, and for order of discharge, with the exhibits filed with the said petition and said petition being duly verified by the affidavit of the petitioner, and upon the writ of habeas corpus issued on said petition on the 11th August, 1896, and duly executed upon I. R. Harkrader, sheriff of Wythe county, and as such, the jailer and warden of said county, in whose custody the petitioner is detained, and upon the return of the said sheriff to the said writ of habeas corpus, with the commitment filed therewith, as the authority under which he acts; upon the demurrer of petitioner to said return and joinder in said demurrer, and upon the answer and denial of the said petitioner, to said return; and upon the record in said case of H. G. Wadley versus Blount & Boynton, et al., and upon the production of the body of said H. G. Wadley, before this court, by the said sheriff, the said sheriff appearing in person, and also by counsel Attorney General of Virginia, and after argument of counsel, and the court being fully advised in the premises, the court finds that the said petitioner, H. G. Wadley, is unlawfully restrained of his liberty by the county court of Wythe county, Virginia, by virtue of an order of the Judge thereof, committing him to custody, in default of bail, entered on 10th August, 1896, on an indictment of the Commonwealth of Virginia, versus H. G. Wadley, on a complaint of felony set up in the petition, notwithstanding the injunction and writ of the court.

It is therefore considered and ordered by this court that the said H. G. Wadley be discharged from the custody of the said I. R. Harkrader, sheriff of Wythe

county, Va., and from the custody of said court, as said court cannot prosecute said indictment pending said injunction, and that the said H. G. Wadley hold himself subject to the further order of this court. And it is further ordered that the United States Marshal for the Western district of Virginia, serve a copy of this order upon I. R. Harkrader, sheriff of Wythe county. Va., and as such, the warden and jailer of said county, and also a copy thereof upon W. E. Fulton, Judge of said county, and Robert Sayers, Jr., Commonwealth's attorney for Wythe county, Virginia.

CHARLES H. SIMONTON,
Circuit Judge.

15th Aug. 1896.

To I. C. Fowler, clerk of this court, at Abingdon, Virginia:

The Attorney General of Virginia, in his proper person, states that from this order the Commonwealth of Virginia desires to appeal.

CHARLES H. SIMONTON.

United States of America,

To W. S. White, deputy of I. R. Harkrader, sheriff of Wythe county, Va., Dr.

1896, Aug. 14th.

To mileage for W. S. White, deputy sheriff of Wythe county, from Wytheville, Va., to Greenville, S. C., for self, 368 miles, at 10c. per mile,	$36 80
Same for H. G. Wadley, prisoner,	36 80
Mileage for self on returning from Greenville, S. C., to Wytheville, Virginia, 368 miles, at 6c. per m.,	22 08

Attendance one day with prisoner before Judge Simonton, 2 00

$97 68

Approved—let it be paid by the Marshal of West Dist. of Virginia.

CHARLES H. SIMONTON,
Circuit Judge.

15 Aug. 1896.

Rec'd, entered and filed,

I. C. FOWLER,
Clerk.

Aug. 18, 1896.

Clerk's Office, U. S. Circuit Court,
W. Dist. Va., Fourth Circuit
at Abingdon.

The foregoing is a true copy from the Order Book in chancery of this court, on page 118–119, of Book No. 2.

Witness my hand and the seal of the court, Dec. 31, 1893.

. . . . . .
. United States Circuit Ct., .
. Western Dist. of Virginia. .
. . . . . .

The deputy clerk of said court, at Abingdon, Va., when he made the transcript of the record for this court, in this case, in addition to the omission of the portion of the entry showing the order to be in vacation of his own will, made this caption to the transcript of the record on page 1, and which was no part of Judge Simonton's order. "At a circuit court of the United States, for the Western District of Virginia, continued and held at

Abingdon, Virginia, on Tuesday, the 18th day of Aug. A. D., 1896, present, the Honorable Charles H. Simonton, Circuit Judge." This caption was the act of the clerk, and not of Judge Simonton, and makes it appear that the final order of discharge was entered *in term* on 18th Aug. 1896. This is not true in fact, as is shown by the order book itself.

The expression "stated term," is not found in the printed record, and not in any entry of the final order in the court below.

Your petitioner respectfully submits that the record, as it was certified to your Honorable court, was incorrect and incomplete, as has since been discovered, and your petitioner, relying upon the clerk of said court, to do his duty in furnishing the appellant a correct copy of the record in this case, only discovered since the decision of this court in this case, on December 5th, 1898, the flagrant errors of omission and commission of the said clerk in making said transcript for this court.

But, petitioner submits that, as the said recital in the transcript on page 1, aforesaid, was, *by the error of the deputy clerk alone*, made to appear as a court order, no mere clerical error, in the recital in the transcript of the record and the omissions therefrom of the proper entry, will be allowed to convert a vacation and chambers order of a circuit judge into a court order at a stated term. That a clerical misprision may and will be corrected in this appellate court, is sustained by an abundance of authorities, with which it would be improper to burden this petition for rehearing. That the recital in the transcript of the record and the omission of the proper entry making it a court order, was the error and fault of the clerk, will be seen from the following affidavits of Hon. Chas. H. Simonton, the Circuit Judge, who made the

order, the deputy clerk at Abingdon, and of the deputy sheriff of I. R. Harkrader, who obeyed the writ and carried petitioner to Greenville, South Carolina, which said affidavits show beyond all doubt, the fact that the final order of discharge, was a vacation and chambers order, and not a court order, and that it was in fact entered as a vacation order and not a court order.

United States of America :

Office of United States Circuit Judge, Fourth Circuit, Charleston, South Carolina, December——, 1898.

I. R. Harkrader, Sheriff and Jailor of Wythe County, Virginia, vs. H. G. Wadley.	On a petition for writ of habeas corpus by H. G. Waddey.

I, Chas. H. Simouton, Judge of the Circuit Court of the United States, Fourth Circuit, do hereby certify that on the 14th day of August, 1896, on an application of H. G. Wadley, for writ of habeas corpus, the sheriff of Wythe county, Virginia, in obedience to a writ issued by me for that purpose, brought and produced the body of the said H. G. Wadley before me at Greenville, South Carolina, where I was holding a term of the United States Court at that place, and that, in chambers and in vacation of the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Fourth Circuit, I heard said application and entered the final order of discharge, on the 14th of August, 1896, and signed the said order as Circuit Judge on the 15th August, 1896, as a vacation order, made in chambers, and I sent said final order of discharge with the papers in the case to I. C. Fowler, Clerk of the United States Circuit Court at Abingdon, Virginia; that it was intended, and in fact was purely a vacation order, made in chambers, at Greeneville, South Carolina, and I certify that I sent said order to said clerk I. C. Fowler, at Abingdon, and

I certify that all the proceeeings in the matter of ex parte H. G. Wadley, on his petition for writ of habeas corpus, from the granting of the writ, to, and including the making and entry of the final order of discharne, were in chambers and in vacation of the said Circuit Court of the United States, for the Western District of Virginia, at Abingdon, Virginia.

Given under my hand, as Judge of the Circuit Court of the United States, for the Fourth Circuit.

CHARLES H. SIMONTON,
Circuit Judge.

19 Dec., 1898.

In the Circuit Court of the United States, for the Western District of Virginia.

H. G. Wadley

vs.

I. R. Harkrader, Sheriff of Wythe county, Virginia.

In the matter of the application of H. G. Wadley, for a discharge on habeas corpus.

I, Stuart F. Lindsey, deputy clerk for I. C. Fowler, the clerk of the Circuit Court of the United States for the western district of Va., at Abingdon, Virginia, do certify that, as such deputy clerk, I made the entry of the original order of discharge of H. G. Wadley, by the Honorable Charles H. Simonton, Circuit Judge, in the above entitled case, in the order book of the above named court on the 18th day of August, 1896; that the order was an order of the said Judge in vacation and at chambers, at Charleston, South Carolina, and was sent to the clerk at Abingdon, by one of the attorneys in the case; that from an examination of the Order Book just made by me, I find that the order of discharge was entered in said book on page 118, and is entitled at the top of the page "Vacation;" that

through a clerical error in making the transcript of the record for the appeal, I inadvertanly omitted to make the entry on said page 118 "Vacation ;" that there was no term of the said Circuit Court of the United States for the western district of Virginia, held at Abingdon, Virginia, after the special term of said court, in July, 1896, until the next regular term thereof, in October, 1896; that Judge Charles H. Simonton was not present at any such court between the above dates; that the recital in the record in the case of I. R. Harkrader, Sheriff of Wythe county, Virginia, against H. G. Wadley, on an appeal from the Circuit Court of the United States from the western district of Va., on page 1 of said record, as follows :

"At a circuit court of the United States, for the western district of Virginia, continued and held at Abingdon, Virginia, on Tuesday, the 18th day of August, A. D., 1896.—Present : The Honorable Charles H. Simonton, Circuit Judge. Among others, were the following proceedings, to-wit :"

was put in the transcript of the record by me by mistake and does not state the correct facts, as I certify that no such court was held here, and that the said Judge Simonton was not present at any such court at Abingdon, Va., as states therein.

In making the record I used the "opening" above quoted,—(and in the record on page 1) simply the form suggested by the "Circuit Court of Appeals for the Fourth Circuit" in such matters, and failed to add the fact of being a "vacation order;" the words "continued and held at Abingdon. Va.," should have been omitted, and the fact of the order in vacation and at chambers at Charleston, S. C., and being entered in order book at Abingdon, Va., appear in stead.

STUART F. LINDSEY, D. C.

Sworn to before me, this the 23rd day of December, 1896, by Stuart F. Lindsey, deputy clerk for I. C. Fowler, the Clerk of the Circuit Court of the United States, for the western district of Virginia.

I. C. FOWLER,
Clerk U. S. Circuit Court for the W. D. Va., at Abingdon, Fourth Circuit.

In the Circuit Court of the United States, for the Western District of Virginia, at Abingdon.

H. G. Wadley,

vs.

I. R. Harkrader, sheriff of Wythe county, Virginia.

In the matter of the application of H. G. Wadley for a writ of habeas corpus.

I, W. S. White, deputy sheriff of I. R. Harkrader, sheriff of Wythe county, Virginia, being duly sworn, do say, that on the 13th of August, 1896, a writ of habeas corpus, issued by Charles H. Simonton, Circuit Judge, on the petition of H. G. Wadley, was executed by I. H. Buford, deputy United States Marshal on said sheriff, commanding him, to have the body of H. G. Wadley, before the said Circuit Judge at Greenville, S. C., on the 14th August, 1896, with the cause of his detention; that affiant in person took the said H. G. Wadley in custody according to the said writ, to the said Greenville, South Carolina, before the said Judge, where on the 14th of August, 1896, at said Greenville, the said Circuit Judge heard the case on said habeas corpus, and at that place, the said Judge on said 14th of August, 1896, discharged said H. G. Wadley from the custody of affiant, according to an order of discharge made there on that day by said Judge.

W. S. WHITE,
D. S. for I. R. Harkrader, S. W. C.

Sworn to before me, this the 27th day of December, 1896, by W. S. White, deputy sheriff for I. R. Harkrader, sheriff of Wythe county

ROBERT W. BLAIR,
Notary Public.

The question now involved in the application, is one of a *purely jurisdictioual nature*; if the final order was was an order of a court, this court has jurisdiction, but if the order was a vacation and chambers order of a circuit judge, then it has no jurisdiction. It is a universal rule that courts, including appellate courts, will hear parol evidence on jurisdictional questions.

Petitioner would show that on the 5th January, 1899, the mandate of this court will be certified down to the circuit court, unless it be arrested, and the judgment of this court of the 5th December, 1898, will be executed, wherefore the case shoulc be retained in this court, and the clerk of this court directed to withhold the mandate until further proceedings can be had. It being manifest that the clerk of the circuit court certified to this court an inaccurate and erroneous transcript of the record, and, by his inadvertence and clerical error, has made it appear that this court had jurisdiction of this case, while, in fact, it had and has none, because the final order of discharge as entered, shows it to be a vacation order.

Therefore your petitioner asks leave under rule 30 of this court, to file the petition for rehearing, and that your honorable court will grant a rehearing of said judgment of 5th of December, 1898; that in the interim the court will not certify the mandate down to the circuit court; that you will award a writ of certiorari to the clerk of the said court, commanding him to certify and transmit to this court, a correct copy of the record in this case

as entered in the order book of said court, and correct copies of the orders made in said case by Hon. Chas. H. Simonton, Circuit Judge, and for such other, further and general relief as the nature of his case may require, and upon a rehearing of said judgment, the appeal be dismissed for want of jurisdiction.

And, as in duty bonnd, &c.

H. G. WADLEY.

Wytheville, Virginia, December 30th, 1898.

I, Frank S. Blair, an attorney duly licensed to practice in the Supreme court of the United States, do hereby certify that, in my opinion, the facts contained in the foregoing petition are true, and that the petition presents a case for a rehearing of the judgment comslained of.

FRANK S. BLAIR.

Virginia.
Wythe county, to-wit :

I, R. W. Blair, a notary public, in and for the county and State aforesaid, do hereby certify that, John C. Blair, one of the attorneys for H. G. Wadley, personally appeared before me in my said county, and made oath that the facts contained in the foregoing petition are true.

JOHN C. BLAIR.

Sworn to before me, this 30th December, A. D., 1898.

R. W. BLAIR,
Notary Public.

HARKRADER *v.* WADLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 41. Argued October 17, 1898. — Decided December 5, 1898.

The facts in the record show that there is no merit in the several objections to the jurisdiction of this court taken by the appellee in this case.

Two propositions have been so firmly established by frequent decisions of this court as to require only to be stated: (1) When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, or to any law or treaty thereof, and where the state court has jurisdiction of the offence and of the accused, no mere error in the conduct of the trial can be made the basis of jurisdiction in a court of the United States to review the proceedings upon a writ of *habeas corpus*. (2) When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.

A court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused.

A Circuit Court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a State to enforce the criminal laws of such State.

In the Circuit Court of the United States for the Western District of Virginia, one H. G. Wadley filed a petition, signed

and sworn to August 10, 1896, praying for the allowance of a writ of *habeas corpus*. The petition was as follows:

"To the honorable Circuit Court of the United States in and for the Western District of Virginia, at Abingdon, Virginia, Fourth Circuit.

"Your petitioner, H. G. Wadley, respectfully represents and shows to this honorable court that he is a citizen of the United States of America and a citizen of the State of North Carolina, and a resident of the city of Wilmington in that State; that he is unjustly and unlawfully detained and imprisoned in the county jail of Wythe County, Virginia, at Wytheville, Virginia, in the custody of I. R. Harkrader, sheriff of said county, and as such the warden and keeper of said jail, by virtue of a warrant or order of commitment made by the county court of Wythe County, Virginia, at Wytheville, Virginia, on Monday, the 10th day of August, 1896, a copy of which order or warrant of commitment is hereto annexed, marked Exhibit A.

"Your petitioner would now show that on a petition filed by him before the Honorable Charles H. Simonton, United States Circuit Court Judge for said Fourth Circuit, embracing said Western District of Virginia, on the 5th of August, 1896, the said honorable judge, Simonton, entered an order on said petition, allowing it to be filed in the equity cause of *H. G. Wadley* v. *Blount & Boynton et als.*, pending in said court, and on said petition, duly verified and sustained by affidavits, the said honorable judge, Simonton, on said 5th day of August, 1896, in accordance to the prayer of said petition, granted an injunction against Robert Sayers, the Commonwealth's attorney of Wythe County, Virginia; J. A. Walker and C. B. Thomas, special prosecutors, and the creditors embraced in said petition, together with their counsel, from all further proceedings in said county court of Wythe upon an indictment obtained against the said H. G. Wadley in said county court on the 16th day of May, 1894, and especially from exacting or requiring any bail or any commitment to imprisonment of said H. G. Wadley on said indictment in said county court.

"A certified copy of the said petition which was presented

to Judge Simonton on the 5th of August, 1896, is herewith filed, marked Exhibit B, and a certified copy of the said order of Judge Simonton of the 5th of August, 1896, on said petition is likewise herewith filed, marked Exhibit C.

"Your petitioner, H. G. Wadley, would further show that heretofore, to wit, on the 31st of January, 1895, on an injunction theretofore awarded by him to your petitioner in his case of *H. G. Wadley* v. *Blount & Boynton et als.*, in this court, by the Honorable Nathan Goff, he, by a decree of that date, fully sustained the contention of your petitioner by refusing to dissolve said injunction and continuing it in full force, and by said decree enjoined and prohibited all further prosecution of said indictment in the county court of Wythe County, Virginia, as shown by copy of the said decree and the opinion of the Honorable Nathan Goff, herewith filed, marked Exhibit D.

"Your petitioner had hoped that after this final decree in the United States Circuit Court by the Honorable Nathan Goff on said injunction, prohibiting all further prosecution of said indictment, that the order of that honorable court would have been obeyed; but that was a vain conjecture, as the said Robert Sayers, Commonwealth's attorney of Wythe County, Virginia, and said special prosecutors, J. A. Walker and C. B. Thomas, persisted and continued, from term to term or from time to time, in calling up said indictment in said county court, and asking for a continuance of the said indictment and for the commitment of the said H. G. Wadley to the county jail of Wythe County, and he was bailed with sureties for his appearance before the said county court to appear on Monday, the 10th of August, 1896, being the first day of the August term of the said county court. Your petitioner would now show that notwithstanding the fact that the honorable judge, Simonton, as aforesaid, did on the 5th of August, 1896, enter said order especially forbidding any further order in said case in said court except a mere order of continuance, and although copies of the said order were duly executed on said Commonwealth attorney, Robert Sayers, and on said special prosecutors, J. A. Walker and C. B. Thomas, and all of the creditors named in said petition and upon their counsel

of record by the marshal for the Western District of Virginia; which order was duly executed on Saturday, the 8th of August, 1896 —

"Your petitioner, H. G. Wadley, would now show that in flagrant and contemptuous violation of both of the orders named, that of the Honorable Nathan Goff, of the 31st of January, 1895, prohibiting all further prosecution of said indictment, and in violation likewise of the said order of the Honorable Charles H. Simonton of the 5th of August, 1896, upon the calling of the said indictment this day in said county court of Wythe County, Virginia, the said Commonwealth's attorney and one of the special prosecutors asked for a continuance and stated that they had nothing to do with the question of bail or with the question of the commitment of petitioner, but that that was the duty of the court, and thus indirectly accomplished what the order of Judge Simonton in express words prohibited, for the said Commonwealth's attorney and special prosecutors, instead of asking a compliance by the said county court with the order of Judge Simonton, indirectly asked the court to commit him by saying it was the duty of the court to do so, and thereupon W. E. Fulton, the judge of the county court of Wythe County, Virginia, in violation of said orders of the United States court, did order the said petitioner, H. G. Wadley, to be committed to the sheriff of Wythe County, to keep and hold him over to answer said indictment, which is now enjoined by the said United States court, and your petitioner is now in the custody of the sheriff of Wythe County, at Wytheville, who is *ex officio* the warden and jailer of said county, and your petitioner is thus deprived of his personal liberty by the said court on its own motion committing petitioner to the custody of the jailer of Wythe County, Virginia, procured as aforesaid.

"Petitioner avers that the said indictment upon which petitioner was committed was illegally and improperly obtained, in violation of petitioner's rights as a citizen of the United States, by the counsel for the said creditors having themselves summoned before the grand jury of the county court of Wythe County, Virginia, on the 16th of May, 1894, and car-

rying before the grand jury and reading to them a copy of the deposition of your petitioner, which had been taken of petitioner in an equity suit of *Blount & Boynton et als.* v. *H. G. Wadley et als.*, and thus indirectly by said record or deposition from the United States court taken in a cause in that court indirectly required petitioner to testify against himself in a criminal case, and upon the mere copy of said deposition of petitioner, illegally taken from the files of the said cause in the United States court and read to said grand jury of Wythe County, petitioner was indicted. A copy of said indictment is fully set forth, with said exhibit, along with the petition filed on the 5th of August, 1896, and is here referred to as a part of this petition.

"Petitioner avers that his term of imprisonment, now complained of, began on the 10th day of August, 1896, at 12 o'clock M., and that such imprisonment still continues, and that he is now in the custody of the said sheriff, as such jailer, at Wytheville, Virginia.

"Your petitioner will now show that his detention and imprisonment as aforesaid is illegal in this, to wit:

"First. That this court, by two decrees, that of Judge Goff of 31st of January, 1895, as also by the second order of Judge Simonton of 5th of August, 1896, declares and adjudicates the prior jurisdiction of the said United States court, both of the person of your petitioner, and also of the subject-matter of the controversy and of the issues involved in said indictment, and that said prior jurisdiction of the said United States court renders such detention and imprisonment of prisoner by said county court illegal.

"Second. That, as stated by the Honorable Nathan Goff in his petition filed with his order of the 31st of January, 1895, in the injunction case, the indictment against petitioner in said county court of Wythe County, Virginia, was obtained against him illegally and in violation of his constitutional rights as a citizen of the United States, by the misuse and abuse of the records of the United States court, in the withdrawal therefrom of a copy of the deposition of petitioner taken in said court in said equity cause and read and used

before the said grand jury of said county court of Wythe as the foundation of said indictment.

"Wherefore, to be relieved from said unlawful detention and imprisonment, your petitioner, H. G. Wadley, prays that a writ of *habeas corpus*, to be directed to I. R. Harkrader, sheriff of Wythe County, Virginia, at Wytheville, Virginia, and keeper of the said jail of said county, and in whose custody petitioner now is, may issue in his behalf, so that your petitioner, H. G. Wadley, may be forthwith brought before this court, to do, submit to and receive what the law may direct, and upon the hearing thereof that your honor will discharge petitioner from all further custody or imprisonment, and that he go hence without bail."

There was attached to said petition the following exhibit:

"This day came The Commonwealth, by her attorney, and James A. Walker and C. B. Thomas, assistant prosecutors, as well as the accused, in his own proper person, in discharge of his recognizance; whereupon the attorney for the Commonwealth moved the court to continue this cause on the ground that there are documents, books and papers in the possession of I. C. Fowler, clerk of the Circuit Court of the United States for the Western District of Virginia, at Abingdon, and that there are other documents, papers and books in the possession of H. B. Maupin, receiver of the said Circuit Court of the United States, in the chancery cause of Paul Hutchinson, administrator, against the Wytheville Insurance and Banking Company, pending therein, which said papers, books and documents are material evidence of the Commonwealth in the prosecution of the said indictment against the said H. G. Wadley, and that the Commonwealth cannot safely go to trial without the said papers, books and documents; that the said J. L. Gleaves, then attorney for the Commonwealth of Virginia for Wythe County aforesaid, at a former term of the Circuit Court of the United States, applied to the said Circuit Court for an order directing the said clerk and the receiver to obey any *subpœna duces tecum* issued from the clerk's office of this court, requiring said clerk and said receiver to produce

said papers, books and documents before this court on the trial of this prosecution, and that since said order was entered in the said Circuit Court of the United States, the said J. L. Gleaves, attorney for the Commonwealth aforesaid, procured *subpœna duces tecum* to be regularly issued from the clerk's office of this court for said I. C. Fowler, clerk as aforesaid, residing at Abingdon, Virginia, and H. B. Maupin, receiver as aforesaid, residing in Wythe County, Virginia, requiring them to produce said papers, books and documents in their possession as aforesaid; which said *subpœnas duces tecum* were duly executed on the said I. C. Fowler, clerk, and the said H. B. Maupin, receiver, but that they refused and declined to obey the same or to produce said papers, books and documents, because since said order was entered by the United States court, and since said *subpœnas duces tecum* were issued and served, the accused, H. G. Wadley, had prepared and sworn to a bill asking for an injunction restraining the said I. C. Fowler, clerk, and the said H. B. Maupin, receiver, from obeying any such *subpœna duces tecum;* which bill was presented by counsel for the said H. G. Wadley to the Hon. Nathan Goff, one of the Circuit Judges of the United States for the Fourth Circuit, and on the *ex parte* motion of the said Wadley the said judge awarded an injunction restraining the said J. L. Gleaves, attorney for the Commonwealth of Wythe County, Virginia, either by himself or the agreement of others; I. C. Fowler, clerk of the said United States Circuit Court; H. B. Maupin, receiver as aforesaid, by themselves or by their agents or defendants, from all further proceedings or participation by them or either of them in a prosecution now pending in the county court of Wythe County, in the name of *The Commonwealth* v. *H. G. Wadley*, for the embezzlement of the assets of the Wytheville Insurance and Banking Company, restraining and enjoining them and all other defendants named in said bill, including their attorneys, clerks, agents, either directly or indirectly, through their own agency or the agency of others, from in any manner using against said H. G. Wadley in any other court, state or Federal, in any other case, civil or criminal, the deposition of the said Wad-

ley taken in another case of *Paul Hutchinson, Adm'r*, v. *The Wytheville Insurance and Banking Company*, pending in the Circuit Court of the United States for the Western District of Virginia, or any copy thereof or extract therefrom.

"And the prayer of said bill is in the following words:

"Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed for, and that they may answer to the matters hereinbefore stated and charged, the prayer of your orator is —

"That this bill of injunction and for relief be treated as incidental to said suit now pending in your honor's said court at Abingdon; that your honor may grant a writ of injunction, issuing out of and under the seal of this honorable court, restraining and enjoining, under the penalty for a violation hereof, all of the defendants to this bill, including their attorneys, clerks and agents, either directly or indirectly, through their own agency or through the agency of others, from in any manner using against orator in any other court, state or Federal, in any other case, civil or criminal, the said deposition of your orator aforesaid taken in said suit in equity, or any copy thereof, or the report of Master Commissioner Gray, taken and filed therein, or any copy thereof, or any of the books, papers, records or correspondence, or any copies thereof or extracts therefrom, of the Wytheville Insurance and Banking Company, in the possession or that came under the control of said Gray, commissioner, or of H. J. Heuser, late receiver, or of H. B. Maupin, present receiver, or of I. C. Fowler, clerk, in said equity suit that was brought in this court by said creditors; that your honor will likewise enjoin each and all of said defendants, creditors, who are now parties by the decrees of this court in said suit in equity now pending in this court, whether they are parties to the original bill or intervenors by petition or are plaintiffs in the amended, supplemental and cross bill, or whose claims have been allowed by or presented to the master commissioner, Gray, for allowance, together with all their attorneys, clerks or agents, either through their

own agency or acts or through the agency or acts of others, and also the said J. L. Gleaves, the Commonwealth's attorney of Wythe County, Virginia, either by himself or by the agency of others, and said commissioner, Gray, receivers Heuser and Maupin, and said clerk, Fowler, by themselves or their agents or deputies, from all further prosecution of or participation by them or by either of them in the criminal procedure now pending in the county court of Wythe County, Virginia, in the name of *The Commonwealth of Virginia* v. *H. G. Wadley*, upon an indictment for embezzlement of the assets of the Wytheville Insurance and Banking Company, the said creditors having already submitted themselves and their claims affected by or involved in said criminal procedure, by their bill in equity, to the prior jurisdiction of this court; that your honor, upon a final hearing of this cause, will punish the parties involved for their unjust and unlawful misuse of the records of this court in said equity suit, for the promotion and prosecution by said creditors of said criminal procedure against your orator, now pending in the said county court of Wythe County, Virginia, put on foot by said creditors and their attorneys.

"Copy. Attest: I. C. Fowler, *Clerk*.

"The restraining order is in the following words:

"This day came H. G. Wadley, one of the defendants in the above proceedings in equity now pending in the above-named court, and he presented his bill for an injunction in his name against said Blount and Boynton *et als.*, and this said bill being duly sworn to by H. G. Wadley and fully supported by the affidavits of J. H. Gibboney, H. J. Heuser and J. B. Barrett, Jr., the cause came on this day to be heard upon said bill for injunction, and upon all the exhibits filed thereto, and upon a transcript of the record of said original bill and said amended, supplemental and cross bill above named, and, upon reading said bill and affidavits and the said exhibits and transcripts, the court is of opinion that the equity jurisdiction of the United States court above named first attached to both the persons and the subject-matter involved in said suits

in equity, and that it is improper that the records of the pleadings, proofs, books and papers filed in and parts of said equity suits now in litigation and pending unadjudicated in this court between said parties, or copies thereof, should be withdrawn therefrom and used by any one in any criminal or other proceedings, in any other court, against the said party to any of said suits, in regard to any matters in issue in said suits in equity, until the same have been fully adjudicated by this court; and it appearing to this court from said bill for injunction that such has been done and is now threatened by parties to said suits in equity for the use in a criminal proceeding just begun by them in the county court of Wythe County, Virginia, against said H. G. Wadley, for matters involved in and growing out of said suits in equity which were first instituted and are still pending in litigation and undetermined in this court, it is ordered that an injunction be awarded to said H. G. Wadley according to the prayer of his bill; and it appearing to the court that the defendants in said bill are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

"But before this injunction shall take effect the said H. G. Wadley will execute a bond before the clerk of the court in the penalty of $10,000, conditioned according to law, with N. L. Wadley, as his surety, who is approved as such surety, proof of her solvency being now made.

"June 8, 1894.

"To I. C. Fowler, clerk United States Circuit Court, Abingdon, Virginia.

"N. Goff, *Circuit Judge.*

"And thereupon, on motion of the attorney for the Commonwealth, the case is continued until the next term.

"And the court, of its own motion, required the prisoner to enter into a bond, with security, in the penalty of $10,000, and until such bond is given he is committed to the custody of the jailer of this county.

"Enter. Wm. E. Fulton, *Judge.*"

Statement of the Case.

In pursuance of this petition a writ of *habeas corpus* was issued, on August 11, 1896, directed to I. R. Harkrader, sheriff of Wythe County, Virginia, and, as such, jailer of said county, commanding him to bring said H. G. Wadley, together with the day and cause of his caption and detention, before Charles H. Simonton, judge of the Circuit Court of the United States within and for said district aforesaid, on August 14, 1896.

On August 14, 1896, I. R. Harkrader, sheriff, produced the body of said Wadley and made the following return:

"To the honorable Judge of the United States Circuit Court for the Fourth Circuit of the United States:

"In the matter of the petition of H. G. Wadley and the writ of *habeas corpus ad subjiciendum* which issued from the clerk's office of the Circuit Court of the United States for the Western District of Virginia on the 11th day of August, 1896, and returnable on the 14th day of August, 1896, in the town of Wytheville, Wythe County, Virginia, this respondent, for answer to the said writ, says that he here produces the body of the said H. G. Wadley, the person named in the said petition for the said writ, in obedience to the command and direction thereof, and for further return and answer to said writ here avers that he detained in his custody the body of said H. G. Wadley, under and by virtue of an order of the county court of Wythe County, State of Virginia, entered in the case of *The Commonwealth of Virginia* v. *said H. G. Wadley* on the 10th day of August, 1896, upon an indictment for a felony pending in said court against said Wadley. So much of said order as relates to the custody of said Wadley is here inserted in the words and figures following, to wit:

"'And the court, of its own motion, required the prisoner to enter into bond, with security, in the penalty of $10,000, and until such bond is given he is committed to the custody of the jailer of this county.'

"And now respondent, having fully answered, prays that said writ may be discharged, and that he may be awarded his

costs about his return to the writ aforesaid in this behalf expended; and, in duty bound, he will ever pray, etc.

"I. R. HARKRADER,

"*Sheriff of Wythe County, Virginia, and as such Jailer Thereof.*"

To this return Wadley filed a reply in the following words:

"The petitioner, H. G. Wadley, comes and says that for ought contained in the said return of I. R. Harkrader, sheriff of Wythe County, Virginia, to his petition for *habeas corpus*, that petitioner is entitled to his discharge because he denies, as contained in said return, said county court of Wythe County, Virginia, had any jurisdiction of said petitioner or the subject-matter of said indictment at the time it was found or now has such jurisdiction. Petitioner denies the validity of the order of commitment of said court of petitioner to said sheriff of 10th August, 1896, relied on in said return, and says that commitment is void, because said court has no jurisdiction to enter it, and also because the indictment upon which the petitioner was so committed was obtained in violation of the Constitution of the United States by the illegal and unconstitutional use of petitioner's deposition withdrawn from the files of this court and carried before and read to the said grand jury which found the said indictment, and hence said custody is unlawful, and petitioner is deprived illegally of his personal liberty."

He also filed the following demurrer:

"And now comes H. G. Wadley in his own proper person and by his counsel, Blair and Blair, and having heard the return of said sheriff read in answer to the writ of *habeas corpus* awarded in this cause, he says that the said return and the matters therein contained and set forth are not sufficient in law, and that the said return shows no legal ground for petitioner's detention by said sheriff, and that it is not sufficient answer to the matters of law and fact contained in said petition and exhibits; and this he is ready to verify; wherefore, for want of any sufficient return in this behalf, said H. G. Wadley, the petitioner, prays judgment that the said

return be held insufficient; that an order be entered discharging petitioner from the custody of the said sheriff."

The record, as certified, discloses the following proceedings:

"On this the 14th day of August, 1896, came H. G. Wadley, the petitioner, by his counsel, Blair & Blair, and this cause coming on to be heard upon the petition for a writ of *habeas corpus* and for order of discharge, with the exhibits filed with the said petition, and said petition being duly verified by the affidavit of the petitioner, and upon the writ of *habeas corpus* issued on said petition on the 11th of August, 1896, and duly executed upon I. R. Harkrader, sheriff of Wythe County, and as such the jailer and warden of said county, in whose custody the petitioner is detained, and upon the return of said sheriff to said writ of *habeas corpus*, with the commitment filed therewith as the authority under which he acts, upon the demurrer of petitioner to said return and joinder in said demurrer, and upon the answer and denial of the said petitioner to said return, and upon the record in said case of *H. G. Wadley* v. *Blount & Boynton et al.*, and upon the production of the body of said H. G. Wadley before this court by the said sheriff, the said sheriff appearing in person, and also by counsel, attorney general of Virginia, and after argument of counsel, and the court being fully advised in the premises, the court finds that the said petitioner, H. G. Wadley, is unlawfully restrained of his liberty by the county court of Wythe County, Virginia, by virtue of an order of the judge thereof, committing him to custody in default of bail, entered on the 10th of August, 1896, on an indictment of *The Commonwealth of Virginia* v. *H. G. Wadley* on a complaint of felony set up in the petition, notwithstanding the injunction and writ of this court, it is therefore considered and ordered by this court that the said H. G. Wadley be discharged from the custody of the said I. R. Harkrader, sheriff of Wythe County, Virginia, and from the custody of said court, as said court cannot prosecute said indictment pending said injunction, and that the said H. G. Wadley hold himself subject to the further order of this court.

"And it is further ordered that the United States marshal for the Western District of Virginia serve a copy of this order upon I. R. Harkrader, sheriff of Wythe County, Virginia, and as such the warden and jailer of said county, and also a copy thereof upon W. E. Fulton, judge of said court, and Robert Sayers, Jr., the Commonwealth's attorney for Wythe County, Virginia.

"15th August, 1896.

"To I. C. Fowler, clerk of this court at Abingdon, Virginia.

"CHARLES H. SIMONTON, *Circuit Judge.*

"The attorney general of Virginia, in his proper person, states that from this order the Commonwealth of Virginia desires to appeal.

"CHARLES H. SIMONTON."

Thereafter, I. R. Harkrader, sheriff of Wythe County, Virginia, by R. Taylor Scott, attorney general of Virginia and counsel for petitioner, filed a petition for an appeal to the Supreme Court of the United States, which was, on October 12, 1896, allowed by the Circuit Judge of the Circuit Court for the Western District of Virginia.

Mr. A. J. Montague, attorney general of the State of Virginia, for appellant.

Mr. F. S. Blair for appellee.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

The appellee has moved the dismissal of the appeal because, as is alleged, the order discharging the prisoner on the writ of *habeas corpus* was made by a judge, and not by a court; because the order, whether made by a judge or a court, was not final, as the prisoner was discharged only "pending said injunction," and was held subject to the further order of the United States Circuit Court, and because there was no certificate from the court below as to the distinct question of jurisdiction involved.

It is, indeed, true, as was decided in *Carper* v. *Fitzgerald*, 121 U. S. 87, that no appeal lies to this court from an order of a Circuit Judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of *habeas corpus*. But this record discloses that, while the original order was made at chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the Circuit Court at a stated term, and therefore the case falls within *In re Palliser*, 136 U. S. 257, 262.

We see no merit in the suggestion that the order discharging the prisoner was not a final judgment. It certainly, if valid, took away the custody of the prisoner from the state court, and put an end to his imprisonment under the process of that court.

That the jurisdiction of the Circuit Court was put in issue by the petition for the writ of *habeas corpus* and the return thereto, is quite evident. The contention made, that such question has not been presented to us by a sufficiently explicit certificate, we need not consider, for the case plainly involves the application of the Constitution of the United States. The division and apportionment of judicial power made by that instrument left to the States the right to make and enforce their own criminal laws. And while it is the duty of this court, in the exercise of its judicial power, to maintain the supremacy of the Constitution and laws of the United States, it is also its duty to guard the States from any encroachment upon their reserved rights by the General Government or the courts thereof. As we shall presently see, this is the nature of the question raised by this record.

It is doubtless true, as urged by the appellee's counsel, that an assignment of error cannot import into a cause questions of jurisdiction which the record does not show distinctly raised and passed on in the court below; but we think that this record does disclose that the assignments of error, which were embodied in the prayer for an appeal, set up distinctly the very questions of jurisdiction which were contained in the record and passed on by the trial court.

The further contention on behalf of the appellee, that the record does not show that the appeal as allowed was ever "filed" in the United States Circuit Court, and that therefore this court is without jurisdiction to entertain the case, we cannot accept, because we think the record, as certified to us, distinctly shows that the petition for appeal was filed on October 8, 1896; that the appeal was allowed on October 12, 1896; that the bond, containing a recital that the said Harkrader, sheriff, had "obtained an appeal and filed a copy thereof in the clerk's office of said court," was filed and approved on October 12, 1896; and that the citation was served and duly filed. This is a plain showing that the appeal as allowed was duly "filed." It is sufficient to cite *Credit Co.* v. *Arkansas Central Railway*, 128 U. S. 258, 261, where it was said: "An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal (where there is such petition and allowance), the appeal bond and the citation. In *Brandies* v. *Cochrane*, 105 U. S. 262, it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office."

We now come to the question, thus solely presented for our consideration, Had the Circuit Court of the United States authority to issue a writ of *habeas corpus* to take and discharge a prisoner from the custody of the state court when proceeding under a state statute not repugnant to the Constitution or laws of the United States, under which the prisoner had been indicted for an offence against the laws of the State?

Two propositions have been so firmly established by frequent decisions of this court as to require only to be stated: First. When a state court has entered upon the trial of a

criminal case, under a statute not repugnant to the Constitution of the United States, or to any law or treaty thereof, and where the state court has jurisdiction of the offence and of the accused, no mere error in the conduct of the trial can be made the basis of jurisdiction in a court of the United States to review the proceedings upon a writ of *habeas corpus*. *Andrews* v. *Swartz*, 156 U. S. 272; *Bergmann* v. *Backer*, 157 U. S. 655. Second. When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Taylor* v. *Taintor*, 16 Wall. 366; *Ex parte Crouch*, 112 U. S. 178.

In the present case it is not contended that the state statute, under which the county court of Wythe County was proceeding, was repugnant to the Constitution or any law of the United States, or that the State did not have jurisdiction of the offence charged and of the person of the accused.

But it is claimed, under the second of the above propositions, that as the Circuit Court of the United States had obtained prior and therefore exclusive jurisdiction of the affairs and assets of the Wytheville Banking and Insurance Company, a corporation of the State of Virginia, by virtue of two suits in equity brought in said court in October, 1893, by creditors of the said banking company, in which suits a receiver to take charge of the property of the bank, and a master to take all necessary accounts, had been appointed, it followed that the state court had no jurisdiction, pending those suits, to proceed by way of indictment and trial against an officer for the offence of embezzlement, as created and defined by a valid statute of the State of Virginia. For the state court to so proceed, it is claimed, constituted an interference with the Federal court in the exercise of its jurisdiction; and that hence it was competent for the United States court to grant an injunction against the prosecution of the

criminal case and to release the prisoner by a writ of *habeas corpus* directed to the sheriff.

It is not denied, on behalf of the appellee, that by section 720 of the Revised Statutes it is enacted that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunction may be authorized by any law relating to proceedings in bankruptcy. Nor do we understand that it is denied that, apart from the effect of section 720, the general rule, both in England and in this country, is that courts of equity have no jurisdiction, unless expressly granted by statute, over the prosecution, the punishment or pardon of crimes and misdemeanors, or over the appointment and removal of public officers, and that to assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the Government. *In re Sawyer*, 124 U. S. 200.

But, as respects section 720, it is argued that it must be read in connection with section 716, which provides that "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law;" and the cases of *French* v. *Hay*, 22 Wall. 231, 253, and *Dietzsch* v. *Huidekoper*, 103 U. S. 494, are cited to the alleged effect that the prohibition in section 720 does not apply where the jurisdiction of a Federal court has first attached.

The cited cases were of ancillary bills, and were in substance proceedings in the Federal courts to enforce their own judgments by preventing the defeated parties from wresting replevied property from the plaintiffs in replevin, who by the final judgments were entitled to it.

As was said in *Dietzsch* v. *Huidekoper*: "A court of the United States is not prevented from enforcing its own judg-

ments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court. Dietzsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin, which had been pending, and was finally determined in the United States Circuit Court. That court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom he represented. The bill in this case was filed for that purpose and that only."

Nor was there any attempt made in those cases to enjoin the state courts or any state officers engaged in the enforcement of any judgment or order of a state court.

It is further contended that when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court, by a bill in equity, as to the matter or right involved, a bill for an injunction will lie to prevent interference by criminal procedure in another court; and the decision of this court in *In re Sawyer*, 124 U. S. 200, is cited, where Mr. Justice Gray said: "Modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*" So, also, the case of *The Mayor &c. of York* v. *Pilkington*, 2 Atkins, 302, is cited, and in that case, where plaintiffs in a chancery bill and cross bill to establish in equity their sole right of fishing in a certain stream, while their bill was still pending, caused the defendant to be indicted at the York Criminal Court for a breach of the peace for such fishing, Lord Hardwicke awarded an injunction to restrain the plaintiff from all further criminal proceedings in other courts, and said that if a plaintiff filed a bill in equity against a defendant for a right to land and a right to quiet the possession thereof, and after that he had preferred an indictment against such defendant for a forcible entry into said land, the court of equity would certainly stop the indictment by an injunction.

But the observations quoted had reference to cases where

the same rights were involved in the civil and criminal cases, and where the legal question involved was the same. Thus the case of the fishery, both in the civil and the criminal proceeding, involved the right of the defendant to fish in certain waters where the plaintiff claimed an exclusive right, and, as no actual breach of the peace was alleged, the public was not concerned. And when, in the later case of *Lord Montague* v. *Dudman*, 2 Vesey, 396, where an injunction was prayed for to stay proceedings in a mandamus, his ruling in *Mayor of York* v. *Pilkington* was cited, Lord Hardwicke said: "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information. As to *Mayor of York* v. *Pilkington*, the court granted an order to stay the proceedings because the question of right was depending in the court in order to determine the right, and therefore it was reasonable they should not proceed by action or indictment until it was determined."

If *any* case could be supposed in which a court of equity might look behind the formal proceeding, in the name of the State, to see that its promoters are parties to the case pending in the court of equity, using the process of the criminal court, not to enforce the rights of the public, but to coerce the defendant to surrender in the civil case, it is sufficient to say that, in the present case, the indictment, whose prosecution the Circuit Court sought to stay, appears to have been regularly found, and to assert an offence against a law of the State, the validity of which is not assailed.

The fallacy in the argument of the appellee in the present case is in the assumption that the *same right* was involved in the criminal case in the state court and in the equity case pending in the Federal court. But it is obvious that the civil liability of Wadley to indemnify the plaintiffs in the equity suits, by reason of losses occasioned by his misconduct as an officer of the bank, is another and very different question from his criminal liability to the Commonwealth of Virginia for embezzlement of funds of the bank. There might well be different conclusions reached in the two courts. A jury in the criminal case might, properly enough, conclude that, how-

ever foolish and unjustifiable the defendant's conduct may have been, he was not guilty of intentional wrong. The court, in the equity case, might rule that the defendant's disregard of the ordinary rules of good sense and management was so flagrant as to create a civil liability to those thereby injured, without viewing him as a criminal worthy of imprisonment. The verdict and judgment in the criminal case, whether for or against the accused, could not be pleaded as *res judicata* in the equity suits. Nor could the conclusion of the court in equity, as to the civil liability of Wadley, be pleadable either for or against him in the trial of the criminal case. Surely if, by reason of a compromise or of failure of proof, the court in equity made no decree against Wadley, the Commonwealth of Virginia would not be thereby estopped from asserting his delinquencies under the criminal laws of the State. Nor would the court in equity be prevented, by a favorable verdict and judgment rendered in the state court, from adjudging a liability to persons injured by the defendant's official misbehavior.

And this reasoning is still more cogent where the respective courts belong one to the state and the other to the Federal system.

Embezzlement by an officer of a bank organized under a state statute is not an offence which can be inquired into or punished by a Federal court. Such an offence is against the authority and laws of the State. The judicial power granted to their courts by the Constitution of the United States does not cover such a case. The Circuit Court of the United States for the Western District of Virginia could not, in the first instance, have taken jurisdiction of the offence charged in the indictment, nor can it, by a bill in equity, withdraw the case from the state court, or suspend or stay its proceedings.

In both of the injunctions pleaded in answer to the return of the sheriff the attorney of the Commonwealth of Virginia for Wythe County was named as such, and was thereby prohibited from all further prosecution of the indictment pending in the county court of Wythe County in the name of the *Commonwealth of Virginia* v. *H. G. Wadley*, charged with

embezzlement of the funds of the Wytheville Insurance and Banking Company.

No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the Commonwealth's attorney, in the prosecution of an indictment found under a law admittedly valid, represented the State of Virginia, and the injunctions were therefore in substance injunctions against the State. In proceeding by indictment to enforce a criminal statute the State can only act by officers or attorneys, and to enjoin the latter is to enjoin the State. As was said in *In re Ayers*, 123 U. S. 443, 497: "How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys and its agents? And if all such officers, attorneys and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

It is further contended, on behalf of the appellee, that even if the injunctions in the equity causes, restraining the proceedings in the county court were erroneous, they could not be attacked collaterally by this appeal in the *habeas corpus* case. The obvious answer to this is that this court is dealing only with the question of the jurisdiction of the court below. To the return of the sheriff, justifying his detention of the prisoner by setting up the order of the county court, the petitioner, Wadley, by way of reply pleaded the injunctions. This, of course, raised the question of the validity of those injunctions. If they were void, they conferred no jurisdiction upon the Circuit Court to enforce them as against the officers and process of the state court.

Again, it is urged that the indictment had been improperly found by reason of the admission before the grand jury of Wadley's deposition in the civil case. But, even if what passed in the grand jury room can be inquired into on a writ of *habeas corpus*, and this we do not concede, the remedy for

such misconduct must be sought in the court having control and jurisdiction over the proceedings.

So, too, any offence to the dignity or authority of the Circuit Court, by the misuse of its records or papers, by its suitors or their counsel, can be corrected by that court without extending its action so as to include the state court or its officers.

We are of opinion, then, that a court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused. Much more are we of opinion that a Circuit Court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a State to enforce the criminal laws of such State.

Therefore the judgment of the Circuit Court of the United States for the Western District of Virginia, discharging said H. G. Wadley from the custody of the said I. R. Harkrader, sheriff of Wythe County, Virginia, and from the custody of said county court of Wythe County, is hereby reversed, and the cause is remanded to that court with directions to restore the custody of said H. G. Wadley to the sheriff of Wythe County, Virginia.